Supreme Court, U. S.
FILED
DEC 22 1977
MICHAEL RODAK, JR., CLERK

APPENDIX (VOLUME I)

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-285

STATE OF CALIFORNIA, et al.,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 19, 1977
CERTIORARI GRANTED DECEMBER 2, 1977

SORG PRINTING COMPANY OF CALIFORNIA, 246 FIRST STREET, SAN FRANCISCO 94105

APPENDIX (VOLUME I)

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DOCKET ENTRIES (FEDERAL DISTRICT COURT)

Date		Filings—Proceedings
1973		
10-15	1.	Fld complaint, issued summons.
10-30	2.	Fld summons on ret exe.
11-13	3.	Fld stip & ord ext time.
11-16	4.	Fld no of mo to stay & consolidate.
11-17	5.	Fld no of mo for ord staying proceedings.
	6.	Fld no of mo for ord staying proceedings.
	7.	Fld no of mo for ord staying proceedings.
	8.	Fld no of mo for ord staying proceedings.
11-19	9.	Fld amend to complaint.
12-20	10.	Fld anser.
1974		
1- 2	11.	Fld memo of State of Cal in partial opp to & partial support of US mo to stay proceedings.
1- 7		Reg for mo to stay & consolidate, Ord briefs fld by Feb 19, & ord Feb 4 hrg on mo for summ judgmt reset to Mar 4, 74 at 2:00 PM.
3- 2		Ord case reset to May 14, 74 for fur proceedings.
3-16	12.	Fld status memo.
5-14		Ord case cont'd to Jun 11, 74 for fur proceedings.
6-11		Reg for hrg on motions, ord submitted on briefs & case cont'd to Jul 8, 74.
7- 8	13.	Fld munite ord re stayed proceedings.
7-13	14.	Fld notice of mo for sum jdgmt.
	15.	Fld no of mo on judgment on Pleadings.
	16.	Fld mo for sum jdgmt.
	17.	Fld mo for judgmt on pleadings.
	18.	Fld memo of po and auth in sup of mo for sum jdgmt and judmt on pleadings.
7-17	19.	Fld pltff interrog to deft.
8-13		Reg for mo for sum jdgmt and jdgmt on pleadings. Stip to Oct 22, 1974.
9-11	20.	Fld pltfs memo of po and auth in opp to defts mo for sum jdgmt and jdgmt on pleadings.
9-18		Reg defts mo for sum jdgmt and jdgmt on pleadings. Hearing reset from Oct. 22, 1974 to Nov. 19, 1974 at 10:00 A.M.
9-21	21.	Fld defts answers to pltfs interrog.
9-11	22.	Fld defts reply memo of po and auth.

Date		Filings—Proceedings
11-12	23.	Fld pltff supp memo of po and auth in opp to defts mo for sum jdgmt and jdgmt on pleadings.
11-13	24.	Fld notice and order on mo for sum jdgmt on pleadings be re-set to Nov. 25 and 26, 1974 at 10:00 A.M.
11-19	25.	Fld defts reply memo of po and auth.
11-25		Reg for defts mo for Sum Jdgmt and Jdgmt on pleading. Oral arg made by both parties and cont'd to Nov 26, 1974 for fur hearing.
11-26		Reg for Further hearing. Ord. case cont'd to Nov 27, 1974 for F/P.
11-27		Reg for Further hearing and completion of arg. Ord fur briefing as fol Ca. to open Jan 2, 1975; U.S. reply Feb. 2, 75; Ca to close Feb 24, 75. with the case taken under submission on Feb 24, 75. The transcript is to be available within 60 days. Cont'd to Feb 24, 75 for F/P.
12-30	26.	Fld memo of po and auth Amici Curiae in opp to mo of defts sum jdgmt.
1975		
1- 2	27.	Fld defts opening brief.
	28.	Fld memo of Kern Co. Water Agency as amicus curiae.
2- 7	29.	Fld pltfs opening brief after hearing on mo for sum jdgmt.
2-24		Ord cont'd to Apr 21, 1975 for F/P.
2-28	30.	Fld defts reply brief for sum jdgmt.
6-21		Ord cont'd to 6-30-75 for F/P.
6-30		Reg for F/P. Cont'd to 8-25-75.
6-25		Reg F/P. Cont'd to 10-20-75.
10- 9	31.	Fld opinion. Mo for sum jdgmt Denied. U.S. Mo Granted.
10-14	32.	Fld cert of serv by mail.
10-16	33.	Fld Judgment. Ent this day. Mld.
10-28	34.	Fld no of appeal.
	35.	Fld personal bond on appeal. $250.00 Cash. Mld notices.
11- 3	36.	Fld designation of record on appeal of Ca.
11- 5	37.	Fld pltfs X-designation of record on appeal.
11- 6	38.	Fld request to include proceedings in transcript had on 11-27-74.
11- 7	39.	Fld appellant's designation of record. (AG)

Date		Filings—Proceedings
12- 8	40.	Fld ord ext time to transmit record on appeal.
1- 7	41.	Fld ext for transmission of appeal to Feb. 26, 1976.
3-11	42.	Ord of 9th Cir directing clerk's transcript to be filed in that court by 3-23-76.

75-3554

DOCKET ENTRIES—9th CIRCUIT
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. S-3014
Judge Thomas MacBRIDE
of
filed 10-28-75
Fed. Rep. 2nd P 1239
D in DC: 10-15-73

IL DC Eastern California (Sacto)

United States of America,
Plaintiff-Appellee

vs.

State of California, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, et. al.,
Defendants-Appellants

For Appellant:
Richard Nichols,
Asst US Atty.

For Appellant:
Roderick Walston,
Deputy Atty Gen.

Date	Appellant's Account	Balance	Received	Disbursed
28	Deposit, 12 St. of Ca. Atty G. (53967)	50	50	
28	Treasurer U.S.	—	—	50

Date	Filings—Proceedings
1975	
Nov. 21	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. -acb-
Dec. 29	Filed Aplt's Motion for Ext. of Time to Transmit record and for filing of record on appeal. (to C) -acb-
1976	
Jan 6	Filed order (C) Record due 56 days date (Jan 2). ec
Mar 8	Filed Appellants' motion for order directing filing of record on appeal without inclusion of reporter's trans., or in the alternative for an order extending time for transmission of record on appeal and directing preparation of reporter's transcript by date certain. to "C" ec
Mar 10	Filed order (C) The clerk of the district court will cause the record to come forward within 14 days (of March 9, 1976) without the transcript. -dmf-

Date	Filings—Proceedings
1976	
Mar 17	Filed Appellants' motion (State of California, et al) for expedited hearing on appeal and for establishment of briefing schedule. to "C"
March 23	FILED CERT TRANSC RECORD ON APPEAL IN FOUR VOLUMES: VOLS. I-IV, PLDGS, THREE CERT COPIES. ONE BOX IN ROOM 208. -acb-
Mar. 23	Aplt's brief due May 2, 1976
Mar 29	Filed Appellee's (USA) motion for summary affirmance. 3/26 to Schickele (copy to "C") Filed Appellee's (USA) opposition to motion for expedited treatment, to "C") (copy to Schickele)
Mar 29	Filed order (C) Case will proceed on normal briefing schedule. When appellants opening brief is filed counsel may move to set the case. -dmf-
Mar 30	Filed Appellants' Reply to Opposition to Motion for expedited hearing on appeal. to "C" (copy to Schickele) ec
Apr 6	Filed Appellants' (State of Calif. & State Water Resources) to augment record and request to take judicial notice, affidavit of Richard C. Jacobs. 4/5 to Schickele. Filed Appellants' (State of Calif., et al) motion for leave to file oversized brief. to Schickele. Filed Appellants' (State of Calif., et al) motion for expedited hearing on appeal and to set appeal for argument. to Schickele
Apr 6	Rec'd 25 oversize Aplts' Briefs (State of California, et al) 4/5/76 -dmf- (two copies to Schickele)
Apr 6	Filed as of April 5th, order -C- "order of March 26, 1976 (filed in clerk's office 3-29-76) will stand. In reapplying the aplts will state that aple is opposed." cjb
Apr. 7	Filed Application of Dept. of Water Resources of the State of Calif. for permission to file Amicus Curiae Brief. (to Schickele)
Apr. 7	Rec'd 25 Amicus Curiae Brief. (Dept. of Water Resources of the State of Calif.) (2 copies to Schickele) -acb- 4-7-76
Apr 14	Rec'd from Atty. General, Calif. (appellant) letter dated Apr 12, 1976, re renewed motion to expedite (filed Apr 6/76), the motion should note that the appellee was opposed. to Schickele
Apr 20	Rec'd from aplt (Atty. Gen., Calif.) copy of letter asking to consider opening brief as opposition to motion for summary affirmance. to Schickele -dmf-

Date	Filings—Proceedings
1976	
Apr 21	Filed Motion of the City of Sacramento and Arcade County Water District for leave to file brief amicus curiae in support of appellants. 4/21 to Schickele w/copies of brief
Apr 21	Rec'd 25 Joint Amicus Curiae briefs (City of Sacramento and Arcade County Water District) 4/21/76 -dmf-
Apr. 26	FILED AS OF APRIL 20, 1976, CERT SUPPL RECORD ON APPEAL: ONE VOL OF RPTRS TRANSC, VOL. V, ORIG. & ONE COPY. RECORD NOW IN FIVE VOLUMES.
Apr 26	Filed order (C) permitting City of Sacramento and Arcade County Water District to file a joint Brief Amicus Curiae. Effective six days after date (April 24, 1976) if no objection filed meanwhile. -dmf-
May 3	Filed 25 Joint Amicus Curiae Briefs (City of Sacramento and Arcade County Water District) 4/21/76 -dmf-
May 6	Filed Appellee's motion (USA) for ext of time to file appellee' brief. to Schickele ec
May 10	Rec'd Notice of Withdrawal as Amicus Curiae of the State of South Dakota (no motion to appear as amicus was filed)
May 11	Rec'd from appellant (State of California) letter dated May 10, 1976, informing that they have no objection to the motion for extension of time for filing appellant's brief (filed May 6), but will oppose any further request for extension of time. to Schickele
May 13	Filed as of May 10, 1976, order (Hu, Cy) a) the motion for summary affirmance is denied; b) motion for expedited hearing is granted insofar as the clerk of the court is requested to schedule the case for oral argument in August or September, 1976; c) motion for leave to file an oversized brief is granted; d) motion to augment the record is denied and the request to take judicial notice is referred to the panel which hears the case; e) motion of the California State Water Resources Board for leave to file an amicus brief is granted. -dmf-

Date	Filings—Proceedings
1976	
May 13	Filed as of May 10, 1976, 25 Aplts' Briefs (State of California, et al) 4/5/76 -dmf-
May 13	Filed, as of May 10, 1976, 25 Amicus Curiae Briefs (California State Water Resources Board) 4/7/76 -dmf-
May 19	Rec'd from Atty. General letter dated May 18, 1976, re matters to be stricken from their brief.
May 26	Filed Motion for late filing of Amici Curiae Brief on behalf of the States of Arizona, Colorado, Idaho, Kansas, Montana, Nebraska, etc. to "C" w/copy of brief.
May 26	Rec'd late 25 Amicus Curiae Briefs (States of Arizona, Colorado, et al) 5/26/76 -dmf-
May 27	Filed order (C) granting leave to file Amicus brief. Subject to reconsideration if any objection filed within 7 days. jr
May 27	Filed 25 Amicus Curiae Briefs (State of Arizona, Colorado, et al).
May 27	Filed, as of 5/26/76 order (W & S) upon due consideration, the motion for ext of time to file a brief is granted to and including June 21, 1976. jr
May 28	Filed Application of the Environmental Defense Fund, Inc., et al., for permission to file amicus curiae brief. to Schickele w/brief.
May 28	Rec'd 25 Amicus Curiae Briefs (Environmental Defense Fund, et al) 5/28/76 -dmf-
Jun 21	Filed aple's motion for ext of time to file brief. (to THE CLERK)
Jun 25	Filed and order (Clk) granting aplee (USA) an ext of time to file brief to and including June 25, 1976. -dmf-
June 28	Filed aple's motion for permission to file xeroxgraphic copy of brief pending repro. to "C" w/copy of brief. ec
June 30	Rec'd from Atty. Gen., California, letter dated June 29, 1976, advising that the State of Texas joins in the brief filed by State of Arizona, et al)
June 30	Filed as of June 24, 1976 order (Cy & Ky) upon due consideration, the application for permission to file an amicus curiae brief by the Environmental Defense Fund, Inc., the Natural Resources Defense Council, Inc., and the Sierra Club is granted and the brief heretofore received is ordered filed. jr

Date	Filings—Proceedings
1976	
Jul 2	Filed order (C) granting aplee (USA) leave to file xerographic copy of brief pending repro. -dmf-
July 6	Filed, as of June 24, 1976, 25 Amicus Curiae Briefs (Environmental Defense Fund, et al) 5/28/76 -dmf-
Jul 7	Filed, as of July 2, 1976, one xerographic copy aplee's brief (USA) 6/25/76 -dmf-
Jul 13	Filed Motion and Order (Clk) granting aplt an ext of time to file reply brief to and including July 19, 1976. -dmf-
Jul 16	Filed 25 Aplee's Briefs (7/2/76) -dmf-
Jul 20	Filed motion & order (Clk) extending time for filing aplts' reply brief to July 21, 1976. ec
Jul 21	Filed Appellants' motion (State of California, et al) for leave to file oversized brief. to Schickele ec
Jul 21	Rec'd 25 oversized Aplts' Reply Briefs (7/21/76) -dmf-
Jul 23	Filed Motion of Contra Costa County Water Agency for leave to file its brief as amicus in support of appellants. to panel w/brief
Jul 23	Rec'd 25 Amicus Curiae Briefs (Contra Costa County Water Agency) 7/23/76 -dmf- (panel)
Jul 29	Rec'd from Atty. Gen, Ca. letter dtd. Jul 28, 1976, indicating that aplt has no objection to the filing of Amicus brief (Contra Costa Water Agency) to panel ec
Aug 5	Filed order (Ca) It is hereby ordered that Contra Costa County Water Agency shall be permitted to file in the above-entitled appeal its brief as Amicus Curiae. -dmf-
Aug 5	Filed 25 Amicus Curiae Briefs (Contra Costa County Water Agency) 7/23/76 -dmf-
Aug 12	Filed order (H, T) Upon due consideration, the motion for leave to file an over length reply brief heretofore received is granted. -dmf-
Aug 12	Filed 25 Aplts' Reply Briefs (7/21/76) -dmf- (panel)
Sept 2	Rec'd from Atty. Gen., Calif., letter dtd. Sept 2, 1976, requesting that each side be given 45 minutes to argue. panel
Sept 3	Pursuant to instructions from the Court (via way of memorandum) counsel advised via telephone that the Court allot 45 minutes per side for oral argument. jc

Date	Filings—Proceedings
1976	
Sept 3	Atty general letter of 8/24/76 (submitted to panel 8/26/76) requesting add'l time for oral argument. (Letter recvd 8/26/76)
Sept. 7	ARGUED & SUBMITTED BEFORE: DUNIWAY, CARTER & WALLACE, CJJ
Sept 13	Rec'd from U.S. Dept. of Justice, Washington D.C., letter dtd. Sept 9, 1976, re add'l citation. panel ec
1977	
Jan 18	Filed aplts' (State of Calif., et al) motion to augment record on appeal by inclusion of newly discovered evidence. 1-17 panel
Jan 27	Filed Response (USA) to motion to augment record with newspaper clipping. panel ec
Feb 7	Received from aple (USA) letter dated 2/2/77 re case of *Israel v. Morton*. (panel) ec
Feb 9	Rec'd from aplt letter dated Feb 7, 1977, re case of *Israel v. Morton* and additional citations. (panel) -dmf-
Feb 22	Rec'd aplt's letter (State of Calif.) dated Feb 18, 1977. panel
Feb 28	Rec'd from aple (USA) letter dated Feb 25, 1977, in response to letter dated Feb 18, 1977 (State of Calif.) to panel ec
Apr 1	ORDERED OPINION *(DUNIWAY)* CARTER CONCURRING SPECIALLY; WALLACE CONCURRING & DISSENTING; FILED & JUDG TO BE FILED & ENTD
Apr 1	Filed opinion—The judgment is affirmed.
Apr 1	Filed & Entd Judgment. -fn-
Apr 1	Filed as of Mar. 31, order (D, CA, & WL) The motion to augment the record on appeal, rec'd by the clerk on Jan. 18, 1977 is granted, and the record is augmented accordingly. -fn-
Apr 5	Filed aplt's (State of Calif. et al) application for ext of time w/in which to file petition for rehearing. (D) ec
Apr 7	Filed order (D) Granting aplts' motion for an ext of time to and including April 29, 1977 in which to file a petition for rehearing. -fn-

Date	Filings—Proceedings
1977	
Apr 15	Filed Aplts' (State of Calif., et al) Petition for Rehearing. 4/15 panel
Apr 26	Clerk's letter advising that the court desires to have a response to the petition for rehearing, to be filed no later than May 9, 1977. -dmf-
May 3	Filed Aplts' (State of Calif., et al) motion to augment record on appeal by inclusion of newly discovered evidence. 5/3 panel
May 16	Rec'd Aplts' (State of Calif., et al) Reply to response to Petition for Rehearing. (Response to Petition not yet rec'd) to panel
May 17	Rec'd Aple's Response to Petition for Rehearing (late) 5/9 to panel
May 19	Filed motion (State of Calif., et al) for permission to file reply to response to petition for rehearing (panel) ec
May 20	Filed order (D, CA & WL) The motion of the aplts to augment the record on appeal by inclusion of newly discovered evidence, rec'd by the clerk on May 3, 1977, is denied.
May 26	Filed Aplts' (State of Calif., et al) motion to file response to petition for rehearing late. to panel ec
June 2	Filed order (D) State of Calif.'s motion for permission to file reply to response to petition for rehearing is granted.
June 2	Filed State of Calif.'s reply to response to petition for rehearing which was rec'd on May 16, 1977. -fn-
June 2	Filed order (D) Granting Aple's (UNITED STATES)'s motion to file response to petition for rehearing.
June 2	Filed (UNITED STATES)'s response to petition for rehearing, which was rec'd on May 17, 1977. -fn-
Aug 12	ORDERED OPINION (DUNIWAY) WALLACE CONCURRING IN PART; FILED & JUDG TO BE FILED & ENTD
Aug 12	Filed opinion—The petition for a rehearing is denied.
Aug 25	Received Supreme Court notice of filing petition for certiorari on Aug 19 '77, assigned no. 77-285. ogm

Original Filed Oct. 15, 1973
Clerk, U.S. District Court
Eastern District of California

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In the United States District Court
for the Eastern District of California

No. Civ. S3014

The United States of America,
Plaintiff,

v.

The State of California, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, Jean Auer, And W. Don Maughan, as members of the State Water Resources Control Board,
Defendants.

COMPLAINT FOR DECLARATORY RELIEF

I
ACTION AND JURISDICTION

1. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. Section 1345.

2. This is an action for a declaratory judgment pursuant to 28 U.S.C. Section 2201, for the purpose of determining a question of actual controversy between the parties as hereinafter set forth. [1]

II
PARTIES

3. Plaintiff, the United States of America, through its agency the Bureau of Reclamation of the Department of the Interior (hereinafter referred to as the "Bureau"), is engaged in the construction and operation of the Central Valley Project (hereinafter referred to as "CVP").

4. Defendants herein are the State of California; the State Water Resources Control Board, a public agency of the State of California created by the California Legislature pursuant to the provisions of West's Ann. Water Code, Section 174 *et seq.;* and that Board's five members, W. W. Adams, Ronald B. Robie, Roy E. Dodson, Jean Auer, and W. Don Maughan, who are appointed by the Governor of the State of California. The defendant Board is located in the City and County of Sacramento, California, and within the territorial jurisdiction of this Court. The Board is the successor to the duties, liabilities and responsibilities of the State Water Rights Board. West's Ann. Water Code, Section 179.

III
VENUE

5. Venue for this action properly lies in the United States District Court for the Eastern District of California

pursuant to 28 U.S.C. Section 1391(b), in that the plaintiff's claims arose in the Eastern District of California.

IV
THE CENTRAL VALLEY PROJECT

6. The Central Valley Project, a federal reclamation program, was designed to provide, among other things, [2] for the coordinated development of the Sacramento and San Joaquin Rivers and their tributaries through a system of physical works to regulate and distribute water supplies needed for agricultural, industrial and municipal development in the Central Valley of California. For extensive descriptions of the project see *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275 (1958), *United States v. Gerlach Live Stock Co.,* 339 U.S. 725 (1950), and *Dugan v. Rank,* 372 U.S. 609 (1963).

7. The Central Valley Project was authorized as an undertaking by the State of California in the enactment by the California Legislature of the Central Valley Project Act of 1933, Cal. Stats. 1933, Ch. 1042.

8. After the Central Valley Project Act of 1933 was passed, the State of California, failing in its efforts to finance such a giant undertaking, attempted to secure federal assistance. The CVP works were initially authorized as a federal project by the Rivers and Harbors Act of August 30, 1935, P.L. 74-409, 49 Stat. 1028, 1038, and some federal funds were made available for various features of the project in that year. On December 2, 1935, the President approved a report of the Secretary of the Interior, dated November 26, 1935, declaring the Central Valley Project to be feasible from engineering, agricultural, and financial standpoints, approving and recommending its construction as a federal reclamation project.

9. The 1936 session of Congress appropriated funds for continuation of the CVP, Act of June 22, 1936, P.L. 74-739, 49 Stat. 1597, 1622, and in 1937 Congress reauthorized the CVP as a federal reclamation undertaking in the Rivers and [3] Harbors Act of August 26, 1937, P.L. 75-392, 50 Stat. 844, 850.

10. The Rivers and Harbors Act of 1937, P.L. 75-392, 50 Stat. 844, 850, Section 2 provides in part as follows:

> . . . , That the entire Central Valley project, California, . . . , is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes. . . .

11. Construction of the Central Valley Project was begun in 1937 and the initial units of the CVP were first placed in full, coordinated operation in 1951.

12. Over the years the Bureau of Reclamation has filed applications with the State Water Resources Control Board or its predecessors for water uses necessary for various aspects of the CVP. Such filings have been made in the interest of comity with the State of California, but are not required as a matter of federal reclamation law.

13. As water use increased in the Central Valley, it was evident that more units would be necessary to accomplish all of the purposes for which the CVP was envisaged. Accordingly, Congress has continued to authorize additional units and has appropriated additional funds for the Central [4] Valley Project.

V

THE NEW MELONES PROJECT

14. The New Melones Project was authorized as one of the units of the CVP by the Flood Control Act of December 22, 1944, P.L. 78-534, 58 Stat. 88. The project was reauthorized by the Flood Control Act of October 23, 1962, P.L. 87-874, 76 Stat. 1180, 1191, which substantially modified the Project in accordance with House Document 453, 87th Congress, First Session. That Act reads in part as follows:

> . . . That upon completion of construction of the dam and powerplant by the Corps of Engineers, the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws, except that the flood control operation of the project shall be in accordance with the rules and regulations prescribed by the Secretary of the Army: . . . *Provided further,* That before initiating any diversions of water from the Stanislaus River Basin in connection with the operation of the Central Valley project, the Secretary of the Interior shall determine the quantity of water required to satisfy all existing and anticipated future needs within that basin and the diversions shall at all times be subordinate to the quantities so determined: . . . *Provided further,* That contracts for the sale and delivery of the additional electric energy available from the Central Valley project power system as a result of the construction of the

plants herein authorized and their integration with that system shall be made in accordance with preferences expressed in the Federal reclamation laws . . . *And provided further*, That the Secretary of the Army give consideration during the preconstruction planning for the New Melones project to the advisability of including storage for the regulation of streamflow for the purpose of downstream water quality control. [Emphasis added.]

15. The Congressionally approved New Melones Project provides for a dam on the Stanislaus River, about [5] thirty-five miles northeast of Modesto, California, to create a reservoir with a gross storage capacity of about 2,400,000 acre-feet for flood control, irrigation, municipal, industrial, domestic, power, recreation, water quality control, and fish and wildlife purposes.

16. The New Melones Project provides for construction of a 300,000 kw capacity hydroelectric powerplant immediately below the dam. The Project will also provide flood protection to about 35,000 acres of highly developed agricultural land in the flood plain of the Stanislaus River and to suburban areas. When completed the New Melones Project will develop a presently estimated conservation yield of 285,000 acre-feet annually including up to 70,000 acre-feet for water quality in any one year. This yield will provide a new irrigation supply for diversion to the local service areas or for export to other areas in the Central Valley needing water; provide urgently needed power; provide recreational opportunities and insure the preservation and propagation of fish and wildlife; and provide water quality control along the Stanislaus, the lower San Joaquin River and in the Delta.

17. The United States, through the Bureau of Reclamation, sought to obtain permits to appropriate unappropriated water from the Stanislaus River for development of the New Melones Project, and in this regard, filed Applications 19303 and 19304 and sought as well the assignment of Applications 14858 and 14859. The defendant, on April 4, 1973, rendered Decision 1422 which ruled on these applications. A copy of that decision is attached hereto and made a part hereof.

18. In Decision 1422, the Board specifically found [6] that "[t]here is unappropriated water available to satisfy the demands of the project as proposed." (D-1422 at 26) The Board then ordered that Applications 14858 and 14859 be transferred to the Bureau of Reclamation, and further ordered that permits to appropriate be issued on these applications as well as on Applications 19303 and 19304. (D-1422 at 28)

19. The Board, however, attached numerous conditions and limitations to these permits. (D-1422 at 29-37) Such limitations and conditions interfere with and affect the operation of the Project as authorized by Congress. By way of example:

1.) Decision 1422 gives a preference to the use of the Stanislaus River above the New Melones Dam for boating and rafting uses over the power, lake recreation, fishery, and water conservation uses provided for in Congressional Acts authorizing the New Melones Project. The area above New Melones Dam on which boating and rafting is done consists to a large extent of federal lands withdrawn by the United States for power and reclamation purposes.

2.) Because the Board decided in Decision 1422 that water was not then needed for irrigation and domestic use, it prohibited storage of water in the New Melones Reservoir except for those quantities necessary to provide flows in the Stanislaus River below the New Melones Dam for the preservation and [7] enhancement of fish and wildlife and for the maintenance of water quality. Storage of water for irrigation uses envisioned by the New Melones Project would only be permitted after a satisfactory demonstration to the Board of the need for the water.

3.) Decision 1422 forbids the use of water conserved by the New Melones Reservoir in areas that could be served by other Central Valley Project sources. This limitation is contrary to the Congressional authorization which requires that the New Melones Project be operationally and financially integrated with the Central Valley Project. Decision 1422 also would require the United States to undertake studies, investigations, and measurements that have not been authorized and to submit its operating criteria to the State Water Resources Control Board for approval.

4.) The New Melones Reservoir was planned and authorized to take full advantage of power generation developed from water released from the reservoir for flood control, conservation, water quality control, and fish and wildlife management. To develop the full potential of project water for power generation as authorized by Congress, it is essential that a minimum

pool be established in the reservoir to provide sufficient head for operation of a powerplant Decision 1422 forbids the [8] maintenance of such a minimum power and recreation pool.

WHEREFORE, the plaintiff United States of America requests this Honorable Court to:

(1) Enter judgment declaring that the United States of America can appropriate unappropriated waters necessary for use in any federal reclamation project within the State of California, without the necessity of applying to the California State Water Resources Control Board;

(2) Enter judgment declaring that when the United States of America chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available;

(3) Enter judgment declaring that when the United States chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that that Board cannot impose any terms or conditions in permits issued pursuant to such applications in contravention of federal law;

(4) Enter judgment declaring that Decision 1422 of the California State Water Resources Control Board is void in all respects where that decision conflicts with or contravenes federal law;

(5) Enter an order charging defendants with the costs of this suit; and

(6) Enter an order for such other and further relief as the Court deems proper.

Respectfully submitted,

DWAYNE KEYES
United States Attorney[9]

By: RICHARD W. NICHOLS
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Attorneys for Plaintiff[10]

(Title Omitted in Printing)

AMENDMENT TO COMPLAINT
Filed Dec. 19, 1973
Clerk, U. S. District Court
Eastern District of California

Comes now plaintiff UNITED STATES OF AMERICA, by and through its undersigned attorneys, and pursuant to the provisions of Rule 15(a) of the Federal Rules of Civil Procedure does hereby amend its complaint in the above entitled action by deleting therefrom paragraphs (3) and (4) of the prayer as therein set forth at page 9, lines 15 through 24 of plaintiff's complaint, and by substituting in the place and stead thereof the following paragraphs:

"(3) Enter judgment declaring that when the United States chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that that Board cannot impose any terms or conditions in permits issued pursuant to such applications in contravention of federal law, or which are not specifically authorized and required by federal law, federal regulation or federal administrative directive;

(4) Enter judgment declaring that Decision 1422 of the California State Water Resources Control Board is void in all respects where that decision conflicts with or contravenes federal law, or requires action not specifically authorized and required by federal law, federal regulation or federal administrative directive;".

DATED: December 19, 1973

DWAYNE KEYES
United States Attorney

By: RICHARD W. NICHOLS
Assistant U.S. Attorney

ORIGINAL FILED
DEC 26 1973
CLERK, U. S. DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

(Title Omitted in Printing)

ANSWER TO COMPLAINT

The defendants answer the complaint herein as follows:

1. With respect to the 1st through the 11th paragraphs of the complaint, the defendants admit said allegations.

2. With respect to the 12th paragraph in the complaint, the defendants admit the first sentence thereof, and deny the second sentence thereof.

3. With respect to the 13th through the 15th paragraph of the complaint, the defendants admit said allegations.

4. With respect to the 16th paragraph in the complaint, the defendants admit the first three sentences thereof, and deny the fourth sentence thereof (commencing with the words "This yield" at line 14, and ending with the words "in the Delta" on line 21).

5. With respect to the 17th paragraph of the complaint, [101] the defendants admit said allegations.

6. With respect to the 18th paragraph of the complaint, the defendants deny the first sentence thereof, and admit the second sentence thereof. The Board found that unappropriated water was only available to be collected to storage from November 1 to June 30th of the succeeding year in each year, and found that there was no unappropriated water available during the month of July, August, September and October.

7. With respect to the 19th paragraph in the complaint, the defendants admit the first sentence thereof, and deny the second sentence thereof.

8. With respect to subparagraph 1) of paragraph 19 in the complaint, the defendants deny the first sentence thereof and admit the second sentence thereof. The defendants allege that Decision 1422 states, at page 18, that, "[w]hile stream fishing downstream from the reservoir would be enhanced, it would be practically eliminated in the area to be inundated, together with other stream-related activities and wildlife habitat," and, on page 21, that "any permit issued pursuant to Applications 14858 and 19304 should contain terms requiring releases of up to 98,000 acre-feet annually for maintenance of fish and wildlife as planned by the Bureau."

9. With respect to subparagraph 2) of the 19th paragraph in the complaint, the defendants admit said allegations.

10. With respect to subparagraph 3) of paragraph 19 of the complaint, the defendants deny said allegations. Decision 1422 states, at page 19, that because of the lack of showing of need for water for the project outside the counties of Calaveras, Tuolumne, Stanislaus and San Joaquin, the permits should restrict the place of use of water for consumptive purposes to those counties, but should provide that a petition to include other [102] specific areas will be considered by the Board upon a showing that water from other Central Valley project sources is not available to serve such areas. Furthermore, Decision 1422 states, at page 30, that the Bureau shall submit its operations schedule to the Board for approval.

11. With respect to the allegations in subparagraph 4) of the 19th paragraph of the complaint, the defendants deny the allegations therein on lack of information and belief.

12. The defendants allege that the plaintiff United States is required to comply with all terms and conditions imposed by the defendants on permits issued to the U. S. Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to the federal reclamation laws, including but not limited to section 8 of the Reclamation Act of 1902. See 32 Stat. 390.

13. The defendants allege that the plaintiff United States is required to comply with all terms and conditions imposed by the defendants on permits issued to the U. S. Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to recent environmental legislation passed by Congress, including but not limited to the National Environmental Policy Act (83 Stat. 852).

14. The defendants allege that the United States, by accepting assignments for permit applications and by submitting its own permit applications, has agreed to comply with California law in appropriating water for the Central Valley Project, and the defendants further allege that the plaintiff United States has accepted the benefits of the permits issued by the defendants since 1938, and the defendants therefore allege that the plaintiff United States should be estopped from denying the truthfulness of the allegations in paragraphs 12 and 13 above. [103]

15. The defendants allege that, if the plaintiff United States prevails in its position that it is not required to comply with terms and conditions imposed on permits issued by the defendants, plaintiff United States and the U. S. Bureau of Reclamation are required to surrender any and all permits previously received by the defendants, and to withdraw any and all applications previously submitted to the defendants.

16. The defendants allege that the plaintiff United States failed to file a mandamus action, or any other kind of action, in the courts of California, or any other court, to seek judicial review of D 1422 within the time required by California law, and pursuant to the provisions of California law. Defendants therefore allege that, under California law, the assertion of plaintiff United States concerning the alleged invalidity of D 1422 is bared by the doctrine of res judicata, and that this court is accordingly without jurisdiction to consider said assertions. The defendants further allege that, for the reasons set forth in this paragraph, the plaintiff United States is estopped from denying the validity of D 1422.

17. The defendants allege that any further consideration of the issues in this matter should be stayed pending resolution of the issues raised in *State of California v. Morton*, S 2924, or in the alternative that the two matters should be consolidated.

WHEREFORE, the defendants State of California, State Water Resources Control Board, et al. request this honorable Court to:

(1) Deny the relief sought by plaintiff United States;

(2) Enter judgment declaring that plaintiff United States and the U. S. Bureau of Reclamation are required to comply with conditions imposed in permits issued by the State Water [104] Resources Control Board, which permits authorize said Bureau to appropriate water for use in the Central Valley Project in California;

(3) Enter judgment declaring that Decision 1422 of the State Water Resources Control Board does not conflict with or contravene federal law, and that plaintiff United States and the U. S. Bureau of Reclamation are required to comply with all terms and conditions therein;

(4) Enter judgment declaring that the United States is estopped from denying the validity of D 1422, and estopped from denying its obligation to comply with all terms and conditions therein;

(5) Enter judgment requiring the plaintiff United States and the U. S. Bureau of Reclamation to surrender any permits previously issued by the defendants, in the event that the court grants the relief sought by the plaintiff United States;

(6) Issue an order declaring that this court is without jurisdiction to consider the merits of the action herein;

(7) Stay any further consideration of the matter herein pending resolution of the issues in *State of California v. Morton*, S 2924 (E.D. Cal.), or in the alternative to consolidate that proceeding with this proceeding.

(8) Grant the defendants their costs of suit herein; and

(9) Grant such other relief as the Court deems proper.

DATED: December 21, 1973.

EVELLE J. YOUNGER, Attorney General
CARL BORONKAY,
Assistant Attorney General

RODERICK WALSTON,
Roderick Walston
Deputy Attorney General
Attorneys for Defendants [105]

STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO } ss.

ALICE MAZZA, being first duly sworn, deposes and says:

I am a citizen of the United States, over the age of 18 years, and not a party to the within cause; my business address is 6000 State Building, San Francisco, California 94102; I served a copy of the attached Answer to Complaint on the following by placing same in an envelope addressed as follows:

Hon. Dwayne Keyes
United States Attorney
650 Capitol Mall, Room 2058
Sacramento, CA 95814

Attention: Hon. Richard W. Nichols
Assistant U. S. Attorney

Said envelope was then, on December 21, 1973, sealed and deposited in the United States mail at San Francisco, California, with the postage thereon fully prepaid.

I declare under penalty of perjury that the foregoing is true and correct.

ALICE MAZZA

Subscribed and sworn to before me,
this 21st day of December, 1973.

FLORENCE E. CROZIER
Notary Public

in and for the City and County of
San Francisco, State of California.

UNITED STATES of America,
Plaintiff-Appellee,

v.

The STATE OF CALIFORNIA, State Water Resources Control Board, W. W. Adams, Chairman, Ronald B. Robie, Vice Chairman, Roy E. Dodson, Jean Auer, and W. Don Maughan, as members of the State Water Resources Control Board, Defendants-Appellants.

No. 75-3554.

United States Court of Appeals,
Ninth Circuit.

April 1, 1977.

Rehearing Denied Aug. 12, 1977. [1347]

Evelle J. Younger, Atty. Gen., Carl Boronkay, Asst. Atty. Gen., Roderick E. Walston, argued, and Richard C. Jacobs, Deputy Attys. Gen., San Francisco, Cal., for defendants-appellants.

Carl Strass, Atty., argued, Land & Natural Resources Div., Dept. of Justice, Washington, D. C., for plaintiff-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before DUNIWAY, CARTER and WALLACE, Circuit Judges.

DUNIWAY, Circuit Judge:

The State of California and its State Water Resources Control Board appeal from judgment for the United States entered by the District Court for the Eastern District of California. The opinion and judgment of that court was

reported in *United States v. State of California,* E.D. Cal., 1975, 403 F.Supp. 874. The judgment of the district court appears at 403 F.Supp. 902-03. The principal questions are (1) whether Section 8 of the Reclamation Act of 1902, 32 Stat. 388, now 43 U.S.C. § 383, requires that the United States apply to the California State Water Resources Control Board for a permit to appropriate unappropriated water from the Stanislaus River for the New Melones project, and, (2) if so, what conditions, if any, the Board can attach to a permit that it grants. The questions are of great importance, and we have given them careful attention. [1348]

[1] Our study of the record and the law convinces us that the judgment must be affirmed, substantially for the reasons stated by Judge MacBride in his opinion.

Two recent decisions of the Supreme Court strengthen our conviction. In *Hancock v. Train,* 1976, 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555, the question was whether § 118 of the Clean Air Act, 42 U.S.C. § 1857f, permits a state to require federally owned or operated installations to obtain a permit to operate, as required by the state's federally approved plan for assuring air quality. The pertinent language of § 118 reads:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge of air pollutants, shall comply with Federal, State, interstate, and local requirements respecting control and abatement of air pollution to the same extent that any person is subject to such requirements.
> 42 U.S.C. § 1857f.

The Court states its holding as follows:

> Kentucky, like the Court of Appeals for the Fifth Circuit in *Alabama v. Seeber*, 502 F.2d 1238, 1247-1248 (1974), finds in §§ 118 a sufficient congressional authorization to the States, not only to establish the amount of pollutants a federal installation may discharge, but also to condition operation of federal installations on securing a state permit. We disagree because we are not convinced that Congress intended to subject federal agencies to state permits. We are unable to find in § 118, on its face or in relation to the Clean Air Act as a whole, or to derive from the legislative history of the Amendments any clear and unambiguous declaration by the Congress that federal installations may not perform their activities unless a state official issues a permit. Nor can congressional intention to submit federal activity to state control be implied from the claim that under Kentucky's EPA-approved implementation plan it is only through the permit system that compliance schedules and other requirements may be administratively enforced against federal installations. *Id.* at 180-81, 96 S.Ct. at 2013.
>
> • • • • • •
>
> In view of the undoubted congressional awareness of the requirement of clear language to bind the United States, our conclusion is that with respect to subjecting federal installations to state permit requirements, the Clean Air Act does not satisfy the traditional requirement that such intention be evinced with satisfactory clarity. Should this nevertheless be the desire of Congress, it need only amend the Act to make its intention manifest. *Id.* at 198, 96 S.Ct. at 2021.22 (footnotes omitted).

In *Environmental Protection Agency v. California ex rel. State Water Resources Control Board*, 1976, 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578, the Court reached a similar conclusion as to the effect of § 313 of the Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1323. That section provides that federal installations must "comply with Federal, State, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements." California and Washington sought to apply the permit requirements of their programs. We held that they could do so (511 F.2d 963), but the Supreme Court reversed. Applying the principles of *Hancock, supra,* the Court said:

> Our decision in this case is governed by the same fundamental principles applied today in *Hancock v. Train, ante,* [426 U.S.] at 179 [,96 S.Ct. 2006, 48 L.Ed. 2d 555]: federal installations are subject to state regulation only when and to the extent that congressional authorization is [1349] clear and unambiguous. *Id.* at 211, 96 S.Ct. at 2028.
>
> Except for the reference to service charges, § 313 is virtually identical to § 118 of the Clean Air Act, 42 U.S.C. § 1857f. Taken alone, § 313, like § 118 of the Clean Air Act, states only to what extent—the same as any person—federal installations must comply with applicable state requirements. Section 313 does not expressly provide that federal dischargers must obtain state NPDES permits. Nor does § 313 or any other section of the Amendments expressly state that obtaining a state NPDES permit is a "requirement respecting control or abatement of pollution." *Id.* at 212-13, 96 S.Ct. at 2028 (footnotes omitted).

The language of § 8 of the Reclamation Act of 1902, set out in the opinion of the district court, 403 F.Supp. 885, is no more specific in subjecting federal projects to state permit requirements than are the statutes construed in the foregoing cases. Our view that the judgment in this case

should be affirmed is, we think, supported by the principles applied in those cases. Indeed, we find that California's claim in this case that the United States must obtain a permit and comply with conditions embodied in it is less supportable than the claims of Kentucky in *Hancock, supra,* and of California and Washington in *Environmental Protection Agency, supra.* In each of those cases, it could more plausibly be argued that Congress did intend to subject federal installations to state permit requirements than in this case. When the Congress enacted § 118 of the Clean Air Act and § 313 of the Water Pollution Control Act Amendments of 1972, the use by the state of the permit device as a means of enforcing their laws in these areas was well known. The language of the two acts, subjecting federal instrumentalities to state laws, is very broad. Yet the Court declined to read either section as requiring compliance with state permit requirements.

On the other hand, when § 8 of the Reclamation Act was adopted in 1902, California's permit requirement did not exist. At that time, under the Civil Code of 1872, §§ 1410-1422, surplus water was appropriated by the physical act of taking and diverting it to beneficial use. An appropriator could post a notice of taking at the point of diversion and record a copy with the county recorder. If the appropriator was diligent in completing the work for the diversion, his rights would date back to the posting of the notice. The statute did not create appropriative rights; it merely provided evidence of the date of appropriation. A *fortiori,* then, we cannot read § 8 as requiring compliance with California permit requirements that did not exist when § 8 was adopted.

In 1913, California enacted the Water Commission Act (Cal.Stats.1913, c. 586) which created the State Water

Commission and provided a statutory procedure that could be followed in the appropriation of unappropriated water flowing in any natural channel "for useful and beneficial purposes." The Act became effective, following a referendum vote, in 1914. In 1923, an amendment made the statutory procedure the exclusive method of appropriating water. (Cal.Stats.1923, c. 87.) The Act, as amended, is now part of the California Water Code, Divisions 1 and 2.

[2] As the district judge concluded, a major purpose of § 8 of the 1902 Act was to recognize and protect state water law, particularly the state law doctrine of appropriative rights to water. 403 F.Supp. at 888. Similarly, the Clean Air Act and the Water Pollution Control Act amendments give effect to state law and require compliance with it by federal installations. Indeed, those acts are more specific than § 8 of the 1902 Act. Yet the Court has declined to read them as subjecting federal installations to state permit requirements, even though the use of permits by the states as a means of enforcing their clean air and water pollution laws was known. To read [1350] § 8 of the 1902 Act as requiring compliance with laws that did not then exist and procedures not made compulsory by California until 1923—over 20 years later—would fly in the face of the *Hancock* and *Environmental Protection Agency* decisions. We could only do so if the language of § 8 were much more specific than it is.

[3, 4] In one respect, however, we disagree with Judge MacBride's decision. He says, 403 F.Supp. 889-90:

> Indeed, while the Congressional history of the 1902 Act indicates broad federal purpose and authority in the operation and control of federal reclamation projects, the comity inherent in a federal system would not permit an overbroad usurpation of state sovereignty. Accordingly, the federal government is required, when acquiring water for federal reclamation projects, to

comply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project.

His judgment provides:

(1) The United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, but must first, in accordance with comity, apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water.

(2) When the United States submits applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available.

We agree with this result, but we do not agree that the requirement is one of comity. It is legal requirement of § 8.

Under § 8, the national government, in constructing and administering reclamation projects, must recognize and cannot nullify either water rights created by state laws or the laws that create them. But enforcement of the government's duty via the permit device is not handed over to the state.

The phrase "in accordance with comity" is stricken from paragraph (1) of the judgment. In all other respects, the judgment is affirmed.

JAMES M. CARTER, Circuit Judge, concurring specially:

I concur in the above opinion. *Hancock v. Train,* 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976), and *Environmental Protection Agency v. California ex rel. State Water Resources Control Board,* 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976), make improper, under existing statutes, any state requirements in the nature of permits. The cases hold that is is for the Congress to explicitly determine whether to subject federal agencies to state permits.

I would suggest, however, that it may be one thing for the Congress to provide that a state may require a permit to assure proper air or water quality standards of a federally-owned or operated installation; it is quite another thing to permit a state to require permits for the very operation of such a facility. I cannot envision the Congress providing that the states, by a permit process, may control the operation of federally constructed, funded, and operated water and power projects.

WALLACE, Circuit Judge, concurring and dissenting:

Although recent Supreme Court decisions leave me with no clear concept of what Congress must say in order to require the federal government to comply with state law, I am persuaded that the language of the statute reviewed here is insufficient to validate California's permit procedure. While the "shall" in section 8 of the 1902 [1351] Reclamation Act appears to be mandatory, and while the Bureau of Reclamation's conduct over nearly three-quarters of a century indicates that it had no doubt of the necessity for compliance with state law, I cannot say that the language of the section is any clearer or less equivocal than that rejected as insufficient in *Hancock v. Train,* 426 U.S. 167, 96 S.Ct. 2006, 48 L.Ed.2d 555 (1976), and *EPA v. California ex rel. State Water Resources Control Board,* 426 U.S. 200, 96 S.Ct. 2022, 48 L.Ed.2d 578 (1976). Thus, with reluctance I concur that the statute does not require the Bureau of Reclamation to secure, pursuant to state law, the permit in question.

However, unlike the majority,[1] I would go no further. Nothing in *Hancock* or *EPA* necessarily forecloses federal compliance with state-imposed requirements not involving permits. Indeed, the more than 70 years of cooperative development of water resources in the West under the Reclamation Act attest to the wisdom in providing non-exclusive control over this limited asset.

Also, I believe that we must disapprove that portion of the district court's order that requires the federal government, "in accordance with comity, [to] apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water" and that requires the Board to "grant such applications if unappropriated waters are available." *United States v. State of California, supra*, 403 F.Supp. at 902. By construing section 8 under compulsion of *Hancock* and EPA as not requiring Bureau of Reclamation compliance with state appropriation procedures, we bring an element of uncertainty to the administration of water resources. Absent some mechanism to convey the information, the states cannot know what amount of unappropriated water remains for private use in a watershed after a portion is appropriated by the Bureau. The "comity" theory and

1. The majority's approach to the permit issue seems to be premised on the belief that the impermissible aspect of the state's scheme is not the permit requirement but rather the *conditions* the state has attached to the permit. California has conceded all along that, although the Bureau must seek and secure a permit, the state has no power to attach to the permit conditions inconsistent with or contradictory to congressional purposes underlying the particular reclamation project. California believes, however, that no such conflict exists in this case.

In a proceeding before a state agency, it was determined that the conditions imposed by California were valid. The federal government did not appeal this decision. Accordingly, the government conceded at oral argument that it is precluded by the doctrine of res judicata from raising the issue anew in this case.

application/notice requirement of the district court are an effort to patch this tear caused by the new construction of section 8.

It is a wayward effort. Comity is a concept of deference and voluntary action. *Zink v. Estelle*, 403 F.Supp. 656, 659 (S.D.Tex.1975); *Galloway v. Watts*, 395 F.Supp. 729, 731 (D.Md.1975). To use such a concept as a basis for *requiring* affirmative federal action seems peculiarly incongruous. Accordingly, I agree with the majority's disapproval of the district court's comity theory.

But the majority does no better in its effort for it provides no defensible basis for requiring federal agency action. Accordingly, I must reject that portion of the majority's opinion which directs the federal government "to comply with the *forms* of state law" (emphasis added) because "[i]t is a legal requirement of § 8." Majority op. at 1243.[2]

Concededly where two sovereigns, acting independently, administer water rights in the same watershed, there is a great poten- [1352] tial for uncertainty. But that is what our *Hancock*- and *EPA*-inspired construction of section 8 means. The majority has failed to find a defensible legal

2. While the majority fails to provide us with any legal reasoning for requiring compliance with "the forms of state law," I can only assume that the requirement is derived from federal common law. Before embarking on this new and unchartered course of constructing common law, I would ask: Do we have the legal competency to fashion any rules in this area? Even if we do, is it wise for us to undertake the task? While I entertain doubts that the first question can be answered affirmatively, I am convinced that we ought not undertake the task of judicial rulemaking in an area as complex and sensitive as state-federal relation over water.

If my assumption regarding the federal character of the application/notice requirement is incorrect, then that requirement must be viewed as one of state law. If derived from state law, there would be an inconsisteney with the majority's initial conclusion that section 8 does not require federal agency compliance with state permit procedures.

basis to give effect to its desire to avoid this problem. Unfortunately, I can see no such basis either. Accordingly, we have, I believe, no alternative but to leave it to the legislative branch to devise a solution. Therefore, I would go no further than to disapprove the permit procedure in question.

On Petition for Rehearing

In its petition for a rehearing, California relies upon an argument that it made, but did not emphasize, in its briefs on appeal, an argument that we overlooked. It points to the fact that certain of the permits involved in this case had their origin in two applications filed by the State Department of Finance. These applications were then assigned by the Department to the Bureau of Reclamation. The State points out that its Department of Finance, had it prosecuted the applications to the obtaining of permits, would certainly have been bound by whatever conditions the State Board might impose. It follows, says the State, that the Bureau, assignee, is also subject to those conditions because, as assignee, it could acquire no greater rights than its assignor. The argument is superficially appealing, but, on reflection, we reject it.

The argument overlooks two considerations. The first is that the assignment was of an application, not of a permit containing conditions. The second is that the assignee was the Bureau, a Federal agency exercising powers conferred upon it by the Congress of the United States, whose valid enactments are "the supreme Law of the Land" (U.S. Const. Art. VI, cl. 2).

[5] Under California law, an application for a permit to appropriate surplus or unappropriated water confers nothing upon the applicant as against the state; all that it

confers is a priority over later applicants if the application is granted. Cal.Water Code § 1450 states:

> Any application properly made gives to the applicant a priority of right as of the date of the application until such application is approved or rejected. Such priority continues only so long as the provisions of law and the rules and regulations of the board are followed by the applicant.

Cal.Water Code § 1455 then adds: "The issuance of a permit continues in effect the priority of right as of the date of the application. . . ."

[6] The Supreme Court of California interpreted these provisions in *Madera Irrigation District v. All Persons*, 1957, 47 Cal.2d 681, 690, 306 P.2d 886, 891 *rev'd* on other grounds, *Ivanhoe Irrigation District v. McCracken*, 1958, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313. There the court stated:

> The filing of an application under the present law is comparable and of like effect to the posting and recording of notice or commencement of actual construction work under the rules which had previously prevailed. . . . The Water Code provides that the effect of filing an application confers, for all practical purposes, a priority only.

To the same effect, see *United States v. Fallbrook Public Utility District*, S.D.Cal., 1958, 165 F.Supp. 806, where Judge James M. Carter stated (at 855):

> Until the application to appropriate is acted upon by the State Water Rights Board favorably to the applicant, and the issuance of a permit is directed, the applicant has no property right of any kind as against the state. He has an inchoate, [1353] incipient, conditional right of procedural priority over later applicants. . . .

That is all that the State Department of Finance had, and all that it could assign to the Bureau.

When the Bureau became the assignee of that "inchoate, incipient, conditional right," it was acting in the same capacity as when it filed its own applications. It was acting under the same Federal laws, and, absent those laws, it would have had no right to appropriate any water. Its substantive rights arose from the Congressional legislation, not from the assignment. There is no contention that the assignment was expressly conditioned upon acceptance of whatever permit conditions the State might impose. On the contrary, the State's briefs make it clear that the State Department of Finance filed the applications for one purpose only, to obtain, not for itself, but for the Bureau when the project finally went forward, a priority date as appropriator.[1]

---

1. Originally, the Central Valley Project, of which New Melones is a part, was to be constructed and operated by the State. Therefore, as California told us in its opening brief, its Department of Finance began in 1927 filing applications for permits to appropriate water for the Central Valley Project,

> so that the State—in anticipation of State construction of the CVP—could obtain a prior right to the use of water, as against private appropriators who submitted later applications; . . . .
> (Brief, page 5)
> As noted earlier, Decision 1422 approved the assignment of two applications to the Bureau, and issued permits to the Bureau on the basis of these applications; these applications had originally been filed by a State agency for the purpose of obtaining an early priority date.
> (Brief, pages 83-84)

There is a similar assertion in California's Reply to Response to Petition for Rehearing, page 6:

> [T]he State Department of Finance, in applying for water rights in 1927, did not apply for the purpose of ultimately encumbering the Bureau's water rights. Rather, it applied because it was expected that the State rather than the federal government would build and operate the Central Valley Project, and the State wanted to obtain the earliest possible priority dates in its own water rights.
> (footnote omitted)

It was apparent in 1944 that New Melones was to be built and operated as a Federal Project. It was authorized in the Flood Control Act of 1944, 58 Stat. 887. See also § 203 of the Flood Control Act of 1962, 76 Stat. 1191. Thus, when the State applied for water rights for New Melones in 1952, its purpose was, as it says, to obtain early priority dates, and its intent must have been to do what it ultimately did, to assign its applications to the Bureau of Reclamation, which was to build and operate the project.

We conclude that the Bureau, as assignee of an application, is no more subject to the imposition of conditions by the Board than it is as an original applicant.

The petition for a rehearing is denied.

WALLACE, Circuit Judge, concurring in part:

I concur in part. Concluding that the first of Judge Duniway's reasons to deny the petition is more than adequate ("the assignment was of an application, not of a permit containing conditions"), I would not reach the constitutional issue. *See Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 341, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). [1354]

The UNITED STATES of America,
Plaintiff,

v.

The STATE OF CALIFORNIA et al.,
Defendants.

Civ. No. S-3014.

United States District Court,
E. D. California.

Oct. 9, 1975. [874]

John H. Germeraad, Douglas N. King, U. S. Dept. of Justice, Washington, D. C., Richard Nichols, Asst. U. S. Atty., Sacramento, Cal., for plaintiff.

Evelle J. Younger, State Atty. Gen., and Richard C. Jacobs, Roderick E. Walston, San Francisco, Cal., for defendants.

OPINION

MacBRIDE, Chief Judge.

At the turn of the century, a burgeoning nation was in the midst of Western expansion. Hampering this expansion, however, was the simple geographical fact that great areas within the Western states and territories encompassed arid and semiarid lands. By the enactment of the Reclamation Act of 1902, Title 43 U.S.C. § 371 *et seq.*, Congress concluded that much of these arid and semiarid lands could be made habitable and fruitful by the construction of federally-funded irrigation works.

Now, 73 years, dozens of projects, and billions of dollars later, this court is asked to enter "the delicate area of federal-state relations in the irrigation field,"[1] and resolve

1. *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958).

the question whether a state may impose terms and conditions on the federal government's acquisition of water for reclamation projects.

The United States initiated suit in this court on October 15, 1973, against the State of California, the State Water Resources Control Board, and its members. Jurisdiction was grounded under Title 28 U.S.C. § 1345, conferring original jurisdiction to the district courts over all civil actions, suits or proceedings commenced by the United States. The amended complaint of the United States seeks declaratory relief pursuant to Title 28 U.S.C. § 2201 as follows:

(1) Declaratory judgment that the United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, without the necessity of applying to the California State Water Resources Control Board;

(2) Declaratory judgment that when the United States chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available;

(3) Declaratory judgment that when the United States chooses as a matter of comity to submit applications to the California State Water Resources Control Board, that Board cannot impose any terms or conditions in permits issued pursuant to such applications in contravention of federal law or which are not specifically authorized and required by federal laws, federal regulations, or federal administrative directives;

(4) Declaratory judgment that Decision 1422,[2] an April 4, 1973, decision of the California State Water Resources

2. The conditions and terms imposed by Decision 1422 are specified hereafter in this opinion.

Control Board, is void in all respects where that decision conflicts with or contravenes federal law or requires action not specifically authorized and required by federal laws, federal regulations, or federal administrative directives. [877]

By its answer, California[3] raises the following legal issues in response:

(1) The United States is required to comply with all terms and conditions imposed by California on permits issued to the United States Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, 32 Stat. 390;[4]

(2) The United States is required to comply with all terms and conditions imposed by California on permits issued to the United States Bureau of Reclamation to appropriate water for reclamation purposes in California, pursuant to recent environmental legislation passed by Congress, including the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, 83 Stat. 852, and the National Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371, 84 Stat. 114;

(3) The United States, by accepting assignments for permit applications and by submitting its own permit applications, has agreed to comply with California law in appropriating water for reclamation purposes in California;

(4) The United States has accepted the benefits of the permits issued by California since 1938, and is thus estopped to deny the truthfulness of the statement that it must comply with all terms and conditions imposed by California's permits;

(5) The United States failed to file mandamus action or to seek judicial review in California of Decision 1422 in accordance with California law, and thus the doctrine of *res judicata* bars the United States from alleging the invalidity of Decision 1422.

On September 3, 1974, California moved for summary judgment pursuant to FRCP 56 and for judgment on the pleadings in accordance with FRCP 12(c). By these motions, California contends that there is no genuine dispute of any material fact and that the case is purely one of interpretation of federal and California law. The case is here now for disposition on these motions.[5] To fully understand the posture of this case and the nature of the question presented herein, it is necessary to review its immediate history.

3. For the purposes of brevity and clarity, all defendants in this action shall be referred to as "California."

4. A detailed discussion of Section 8 of the Reclamation Act of 1902 will be made later in this opinion. Section 8 reads as follows:

> "Nothing in [this act] shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, that the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."

5. By order of this court dated July 8, 1974, all action, except for discovery, in four companion cases was stayed pending a decision in the instant case. The stayed cases include: *Central Valley Eastside Project Association v. State Water Resources Control Board* (Civ S-2582); *Kern County Water Agency v. State Water Resources Control Board* (Civ S-2583); *San Joaquin County Flood Control and Water Conservation District v. State Water Resources Control Board* (Civ S-2730); and *State of California v. Morton* (Civ S-2924). All parties in these actions were given leave to file briefs in the instant case as *amici curiae*.

HISTORY OF THE CASE

Following the enactment of the Reclamation Act of 1902, Congress from time to time has authorized specific reclamation projects by way of special reclamation acts. One such special project which was eventually authorized by Congress was the Central Valley Project [hereafter CVP] which envisioned the coordinated development of the Sac-[878] ramento and San Joaquin Rivers and their tributaries through a system of physical works to regulate and distribute water needed for agricultural, industrial and municipal uses in the Central Valley of California. The CVP was authorized by the State of California through the Central Valley Project Act of 1933, Cal.Stats. Ch. 1042. California thereafter sought and secured federal assistance through the Rivers and Harbors Act of August 30, 1935, P.L. 74-409, 49 Stat. 1028, 1038; the Act of June 22, 1936, P.L. 74-739, 49 Stat. 1597; and the Rivers and Harbors Act of August 26, 1937, P.L. 75-392, 50 Stat. 844, 850. The Act of October 17, 1940, 54 Stat. 1198 provided in pertinent part as follows:

> ". . . that the entire Central Valley Project, California. . . ., is hereby reauthorized and declared to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, providing for storage and for the delivery of the stored waters thereof, for construction under the provisions of the Federal reclamation laws of such distribution systems as the Secretary of the Interior deems necessary in connection with lands for which said stored waters are to be delivered, for the reclamation of arid and semi-arid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes. . . ."

Construction of CVP was begun in 1937 and the initial units of CVP were placed into full coordinated operation in 1951. Speaking of the scope of the project, the Supreme Court of the United States noted in the case of *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958):

> "Central Valley is the largest single undertaking yet embarked upon under the federal reclamation program. It was born in the minds of far-seeing Californians in their endeavor to bring to that State's parched acres a water supply sufficiently permanent to transform them into veritable gardens for the benefit of mankind. Failing in its efforts to finance such a large undertaking, California almost a quarter of a century ago petitioned the United States to join in the enterprise. The Congress approved and adopted the project, pursuant to repeated requests of the State, and thus far has expended nearly a half billion dollars." 357 U.S. at 280, 78 S.Ct. at 1178.

Over the years, water uses increased in the Central Valley and Congress continued to authorize additional units and funds for CVP. One such unit, and the subject matter of the instant case, was the New Melones Project. The New Melones Project was originally authorized by the Flood Control Act of December 22, 1944, P.L. 78-534, 58 Stat. 887, and reauthorized by the Flood Control Act of October 23, 1962, P.L. 87-874, 76 Stat. 1180, 1191. The Flood Control Act of 1962 reads in part as follows:

> ". . . That upon completion of construction of the dam and powerplant by the Corps of Engineers, the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamations laws. . . ."

The New Melones Project provides for a dam on the Stanislaus River, approximately 35 miles northeast of Modesto, California, to create a reservoir with a gross storage capacity of about 2,400,000 acre-feet,[6] for flood control, irrigation, municipal, industrial, domestic, [879] power, recreation, water quality control, and fish and wildlife purposes. The New Melones Project provides also for the construction of a 300,000 kilowatt capacity hydro-electric powerplant immediately below the dam.

The United States, through the Bureau of Reclamation, Department of the Interior [hereafter the Bureau], had regularly applied to the California State Water Resources Control Board [hereafter the Board], and its predecessor, in accordance with California law, for permits authorizing appropriations of water. Similarly, the United States, through the Bureau, sought to obtain permits to appropriate unappropriated water from the Stanislaus River for development of the New Melones Project. To this end the Bureau filed with the Board applications Nos. 19303 and 19304, and sought assignments of applications Nos. 14858 and 14859.[7] The Board on April 4, 1973, rendered Decision 1422 which ruled on these applications. Although Decision 1422 granted the assignments and allowed permits to be issued for all the applications, it placed various terms and conditions on the permits. While California asserts that it has the authority to place terms and conditions on permits authorizing appropriations of water for reclamation projects, the United States counters that any imposition of terms and conditions by the state is impermissible.

6. It is estimated that this storage capacity would create a lake stretching approximately 13 miles behind the dam.

7. Applications Nos. 14858 and 14859 were originally filed in 1952 by the California Department of Finance. The Bureau sought assignment of these applications rather than file new ones so as to obtain a priority date of appropriation in accordance to California law.

DECISION 1422

As noted above, the Bureau applied to the Board for permits in the New Melones Project in accordance with four separate applications:

(1) Application 14858 was for a permit to appropriate 8,800 cubic feet per second [cfs] of water by direct diversion year round, and 980,000 acre feet per annum [afa] by storage to be collected from October 1 of each year to July 1 of the succeeding year for irrigation, domestic, municipal, industrial, fish culture, recreation, and water quality purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

(2) Application 14859 was identical to Application 14858 except its purpose was to use the water for power generation purposes.

(3) Application 19303 was for a permit to appropriate 6,000 cfs by direct diversion and 2,400,000 afa by storage, both year round, for power generation from Stanislaus River in Calaveras and Tuolumne Counties.

(4) Application 19304 was for a permit to appropriate 2,250 cfs by direct diversion, and 2,400,000 afa by storage both year round, for irrigation, domestic, municipal, industrial, fish culture, recreation, and water quality control purposes from the Stanislaus River in Calaveras and Tuolumne Counties.

The primary point of diversion under all four applications is the proposed New Melones dam on the Stanislaus River, but there is also included a Knight Ferry division dam downstream from the New Melones dam.[8]

8. The Knights Ferry dam is listed as a point of direct diversion under applications Nos. 14858 and 19304.

Numerous protests were filed in opposition to these applications by various individuals, companies, public agencies such as the Department of Fish and Game, and private associations such as the Environmental Defense Fund and the Sierra Club. These protests were concerned primarily with environmental matters or purported problems of diversion as related to prior users.

[1] California law requires the Board to evaluate the specific intended use of each proposed project and find that it is reasonable, beneficial, and in [880] the public interest. The Board undertakes a balancing of competing demands and policy considerations and has broad discretion. Cal. Water Code § 1240; *Temescal Water Co. v. Department of Public Works,* 44 Cal.2d 90, 280 P.2d 1 (1955). As a preliminary matter, it should be noted that the Board concluded that sufficient unappropriated water was available to supply the Bureau's requests, other factors being equal.[9] Beyond this determination, the Board in Decision 1422 expressed several concerns:

(1) Perhaps of primary concern to the Board was the belief that the limited unappropriated resources of California should not be committed to an applicant in the absence of a showing of actual need for the water presently and within a reasonable time in the future. The Board noted:

> "The lack of evidence that the New Melones Project water will be needed for consumptive use outside the four basic counties [Tuolumne, Calaveras, San Joaquin, Stanislaus] for many years to come, if ever, or that it will be used within those counties at any definite time in the future, raises substantial doubt whether permits should be issued to impound more water in the

9. Decision 1422 at page 26.

> New Melones Reservoir, at least at this time, than is needed for satisfaction of prior rights and non-consumptive purposes—protection and enhancement of fish and wildlife, water quality, recreation, and the generation of power." Decision 1422 at page 17.

The Board noted that the Bureau had presented no specific plan for applying project water for consumptive purposes at any particular location. Further, the Board noted that CVP has substantial quantities of water that are not being used and are not under contract.

(2) The Board was further concerned that the reservoir which would be created by the New Melones dam would eliminate the use of the Stanislaus River for whitewater recreation and for stream fishing. The Board recognized that the reservoir would serve as a man-made lake for purposes of recreation and fishing, but did not consider this an equivalent substitute for the river's natural sources of recreation and fishing. The Board concluded:

> "In view of the preponderance of the adverse consequences of maintaining a reservoir of the size proposed by the Bureau, the public interest requires that any permits issued pursuant to Applications 14858 and 19304 prohibit the impoundment of water in New Melones reservoir for consumptive purposes until further order of the Board following a showing that the benefit that will accrue from a specific proposed use will outweigh any damage that would result to fish, wildlife and recreation in the watershed above New Melones Dam and that the permittee has firm commitments to deliver water for such purposes." Decision 1422 at page 18.

(3) Another concern of the Board was the effect on the Stanislaus River salmon fishing resource—estimated to be worth $300,000 per year—by the granting of applications

Nos. 14858 and 19304. Further study of this factor was felt to be necessary.

(4) The final major issue concerning the Board dealt with the question of granting the applications for the purpose of water storage. The question the Board posed to itself was whether the need for maintaining the river at its present regimen outweighed the need for additional power. Although the Board found that the annual benefits of the power function would be $5.5 million, it felt that the use of the river for recreation and environmental factors—especially whitewater uses and stream fishing—outweighed. [881]

In summary, the Board concluded:

> "There is unappropriated water available to satisfy the demands of the project as proposed. However, the Bureau has no definite plan as to when or at what specific locations project water will be used for consumptive purposes outside the four basin counties, and it has sufficient surplus water from other sources to meet future increased demands outside these counties for a long period of years. Permits should not be issued for use of water outside these counties at this time.
>
> The public interest requires that the use of the Stanislaus River for whitewater boating, stream fishing and wild life habitat be protected to the extent that water is not needed for other beneficial uses. Therefore, although there is a demonstrated need for the full yield of the project for the four basin counties at some time in the future, but for which no contracts have been negotiated, and in view of the adverse effect the proposed reservoir will have upon these recreational uses, impoundment of water to satisfy that need should not be permitted at this time. Instead, the Board should retain jurisdiction over the permits for the purpose of approving incremental appropriations for consumptive use up to the quantities covered by the applications when the need for the water is substantial." Decision 1422 at pages 26-27.

The Board thereupon approved assignment of applications Nos. 14858 and 14859 to the Bureau, and approved these applications and applications Nos. 19303 and 19304, in part. Permits were issued subject to 25 separate terms and conditions. It would serve no useful purpose at this stage to delve extensively into the particulars and requirements of these 25 terms and conditions. However, a summary of these terms and conditions will be helpful to an understanding of the posture of this case:

(1) Conditions relating to impoundment—Conditions 1 and 2 defer full impoundment of all the waters sought by the Bureau until such time as the Bureau is able to demonstrate a plan or a firm commitment for the use of project water.

(2) Conditions relating to reservation of jurisdiction—Conditions 6, 9, 13, 20, and 22 reserve jurisdiction to the Board to impose further conditions on the Bureau to protect the "beneficial use" of water involved.

(3) Conditions relating to reporting requirements—Conditions 3, 7, 8, 12, and 21 impose requirements of further or continuing study or the filing of specified reports.

(4) Conditions limiting or controlling the use of water—Conditions 4, 5, 14, 19, 23, 24, and 25 place various limits or controls on the use of water to or from the project.

(5) Conditions relating to time—Conditions 10 and 11 impose various time constraints on completion of the project and application of water.

(6) Conditions relating to accessability—Conditions 15 and 16 discuss the access to be afforded to representatives of the Board and members of the public.

(7) Conditions imposing mandatory requirements—Condition 17 imposes the requirement on the Bureau to install an outlet pipe "as near as practicable to the bottom of the natural stream channel"; condition 18 requires the Bureau to clear vegetation and structures from the side of the

reservoir in accordance with California Water Code provisions.

QUESTIONS PRESENTED

Although the United States initiated this action in quest of declaratory relief, the legal issues presently before the court are framed by California's motions for summary judgment and judgment on the pleadings. To facilitate analysis, it is possible to consolidate under three general categories, the questions presented by California's motions:

(1) *Interpretation of federal law*—Does Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, require federal [882] agencies, in appropriating water for reclamation purposes, to comply with state law? In this regard, California has asked the court to consider (a) the plain language and the Congressional history of the Reclamation Act of 1902; (b) the cases which have considered the Act;[10] (c) the analogies which might be drawn from other Acts of Congress enacted subsequent to the Reclamation Act of 1902;[11] (d) and the administrative practice of the Bureau of Reclamation.

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10. The cases on which the parties primarily rely include: *Nebraska v. Wyoming*, 295 U.S. 40, 55 S.Ct. 568, 79 L.Ed. 1289 (1935); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356 (1935); *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945); *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 466, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958); *Fresno v. California*, 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963); *Arizona v. California*, 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963); *Ivanhoe Irrigation District v. All Parties*, 53 Cal.2d 692, 3 Cal.Rptr. 317, 350 P.2d 69 (1960).

11. Specific acts relied upon include the Federal Water Supply Act of 1958, 43 U.S.C. § 390b; the Auburn-Folsom South Project Act, 43 U.S.C. §§ 616aaa-616fff (1965); the National Environmental Policy Act of 1969, 42 U.S.C. § 4321; and the National Environmental Quality Improvement Act of 1970, 42 U.S.C. § 4371. In oral argument, California abandoned any reliance on the Federal Water Pollution Control Act, 33 U.S.C. § 1251 (1972).

(2) *Contentions in the nature of estoppel*—(a) Should the United States be equitably estopped to deny the validity of the Board's jurisdiction and of Decision 1422 because the United States initiated proceedings before the Board? (b) What is the *res judicata* and collateral estoppel effect of Decision 1422 as to the United States arising from the failure of the United States to appeal that decision pursuant to California law? (c) Should the court find that as a matter of law Decision 1422 does not materially alter or conflict with the purposes of the New Melones Project? (d) Would the failure to enforce Decision 1422 be contrary to the public policy of the people of California?

(3) *Procedural considerations*—Are the questions presented by this case appropriately determined and resolved by summary procedure?

INTERPRETATION OF FEDERAL LAW

Both the United States and California have admitted to this court in oral argument that pursuant to the Supremacy Clause of the United States Constitution, U.S.Const. Art. VI cl. 2, and because of national implications inherent in reclamation of arid and semiarid lands, the Congress *could* afford all power and control over federal reclamation projects to the federal government, reserving no power or control for the states. See *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 294, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958). The United States has argued that Congress did just that when it enacted the Reclamation Act of 1902. By its reading of that Act, the United States contends that: (1) because all power and control over reclamation projects has been given to the federal government, it need not even apply to the states for permits to appropriate water for such projects, and (2) even if the federal government, because of comity, does apply to the states for permits to appropri-

ate water, the states' sole function is to determine whether there exists sufficient unappropriated water for the project. California, on the other hand, has argued that the Congress, by way of the Reclamation Act of 1902 and other federal legislation, intended that the federal government should physically operate reclamation projects, but that the federal government must comply with state law in the appropriation of water for projects.[12] Thus, the essential dispute between the litigants here is not whether the Congress *could* preempt the field, but whether the Congress *has chosen* to do so. [883]

(1) The Reclamation Act of 1902.

At the very heart of this inquiry is the Reclamation Act of 1902 [hereafter the 1902 Act]. In 1902 the Western states and territories contained nearly one billion acres of land and comprised somewhat more than half of the United States' contiguous area. Great segments of this Western land, however, lay dry and fallow, either unnourished or undernourished by the nation's waterways. Over one-third of North and South Dakota were within the arid and semiarid belts. The portions of the States of Oregon and Washington lying west of the Cascade Mountain Range were within the humid climate, while portions lying east of the range, comprising approximately one-half of the territory of the two states, were arid or semiarid. In California arid and semiarid conditions existed over two-thirds of the state. Nearly one-third of Oklahoma was semiarid in character. Although neither Kansas nor Nebraska contained

12. Both in its briefing and in oral argument before this court, California has conceded that even under its view of the law, there would be two major limitations on the rights of states to impose terms and conditions on federal reclamation projects. These two limitations are: (1) the state cannot infringe on any specific grant of power to the federal government under federal law, and (2) the state can only control unappropriated water.

lands which were strictly speaking arid, nearly one-third of the western portion of each state was considered semiarid. The other states and territories of the West were wholly within the arid region, with the exception of limited areas affected by local conditions.[13]

As the United States grew in population, demand for productive land grew proportionately. It was estimated that through proper irrigation, between 35,000,000 and 70,000,000 acres of land in the West could be reclaimed.[14] In 1900 the national platforms of the major political parties declared in favor of the undertaking by the federal government of the work of reclaiming arid and semiarid lands and holding such lands for settlers.[15]

President Theodore Roosevelt also favored development of the Western states and territories through irigation and vigorously urged the enactment of legislation to this end:[16]

> "It is as right for the National Government to make the streams and rivers of the arid region useful by engineering works for water storage as to make useful the rivers and harbors of the humid region by engineering works of another kind. The storing of the floods in reservoirs at the headwaters of our rivers is but an enlargement of our present policy of river control, under which levees are built on the lower reaches of the same streams.
>
> The reclamation and settlement of the arid lands will enrich every portion of our country, just as the settlement of the Ohio and Mississippi valleys brought pros-

13. Report of the House Committee on Irrigation of Arid Lands, 57th Cong. 1st Sess. p. 1 (1902). Other states and territories included: Arizona, Colorado, Idaho, Montana, Nevada, New Mexico, Utah, and Wyoming.

14. Report of the House Committee on Irrigation of Arid Lands, 57th Cong. 1st Sess. p. 2 (1902).

15. *Id.* at pp. 4-5.

16. *Id.* at p. 5.

perity to the Atlantic States. The increased demand for manufactured articles will stimulate industrial production while wider home markets and the trade of Asia will consume the larger food supplies and effectually prevent Western competition with Eastern agriculture. Indeed the products of irrigation will be consumed chiefly in upbuilding local centers of mining and other industries which would otherwise not come into existence at all. Our people as a whole will profit, for successful home making is but another name for the upbuilding of the nation."

Before enacting the 1902 Act, Congress carefully considered the alternatives that either private enterprise or the states themselves develop reclamation projects, rather than the federal government. It was recognized that private enterprise had constructed various irrigation projects in the past, but it was also recognized that such private projects were of a relatively simple character, intended to supply only single farms [884] or limited areas of country.[17] As to the various states, the Congress considered lack of adequate funds for such extensive projects to be the most serious impediment.[18] Congressman Mondell, the leading advocate in the House for passage of the 1902 Act, suggested other reasons why the federal government, rather than the states, construct the reclamation projects:[19]

> "It has been suggested that if private enterprise can not properly develop large irrigation systems the work might be undertaken by the respective States. There are many reasons why the States are not so well equipped to carry on this work as the Federal Government.

17. *Id.* at pp. 2-3. House Debate on the Reclamation Act of 1902, 35 Cong.Rec. 6669 at 6675 (1902).

18. House Committee at pp. 3-4.

19. House Debate at p. 6676.

> In the first place, were the work carried on by the States, the disposition would be to utilize all of the waters flowing through a State within the State, provided there was no prior appropriation lower down on the stream, regardless of the most beneficial and economical development of the irrigation possibilities of the entire region. Further, the constitutions of some of the States forbid the undertaking of works of internal improvement; and even were the States the proper agency through which to carry on this development, none of the States in the arid region, are financially able to do so."

Nevertheless, the Congress was mindful that the individual states had substantial and legitimate interests in the appropriation, use, and distribution of water used for irrigation. There were interests represented in the Congress which favored strong States' rights and advocated legislation whereby the federal government would simply build the reclamation project works and then turn over to the states control of the waters. On the other hand, there were advocates of reclamation legislation which would be more limiting on the States' authority, with power vested primarily in the federal government.

Section 8 of the 1902 Act as originally drafted and passed by the Senate was a strong States' rights provision:[20]

> "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation; *but State and Territorial laws shall govern and control in the appropriation, use and distribution of the waters rendered available by the works constructed under the provisions of this act:* Provided, That the right to the use of water acquired under the

20. S. 3057, 57th Cong., 1st Sess., § 8 (1902).

provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." [emphasis added].

The above-quoted provision was then amended in the House Committee on Irrigation of Arid Lands. It is the House amendment which was enacted into law and that amendment reads as follows:[21]

> "Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, *or any vested right acquired thereunder and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any land owner, appropriator, or user of water in, to or from any interstate stream or the waters thereof:* Provided, That the right to the use of water acquired under the provisions of this act shall be appurtenant to the [885] land irrigated and the beneficial use shall be the basis, the measure, and the limit of the right." [emphasis added.]

The change the House Committee made in the legislation apparently resulted from intervention by President Roosevelt, as noted by Representative Robinson of Indiana:[22]

> "At the beginning of this session the arid-State members in committee assembled properly elected the gentleman from Nevada chairman and proceeded to draft an irrigation bill. The committee was composed of a large majority of Republicans, but politics was submerged to get some irrigation legislation. The committee, of course, was confronted with platforms and constitutions, national and State. Where they pointed their way, they adopted them; where they ran counter, they ran over them or passed them by.
>
> They took up first the Republican national platform of 1900, and upon that this bill was drafted and introduced in the Senate. After a little while the bill passed without a division in the Senate, and went to the House Committee on Arid Lands, a majority of whose members are from arid or semiarid States.
>
> The troubles then began. The President was for one kind of irrigation, with national control of canals and water distribution, and the Republican platforms, national, State, and Territorial, and some State constitutions of States affected, were for another kind, with State control of canals and water distribution. The President told the committee that called on him that the Senate bill was not in consonance with his ideas of irrigation; that if the United States built canals it should, to keep the water supply from politicians, control the distribution."

This presidential intervention and its purpose was confirmed by President Roosevelt in his autobiography:[23]

> "On the day the message was read, a committee of Western Senators and Congressmen was organized to prepare a Reclamation Bill in accordance with the recommendations. By far the most effective of the Senators in drafting and pushing the bill, which became known by his name, was Newlands. The draft of the bill was worked over by me and others at several conferences and revised in important particulars; my active interference was necessary to prevent it from being made unworkable by an undue insistence upon State Rights, in accordance with the efforts of Mr.

21. House Committee at p. 20.

22. House Debate at p. 6670.

23. Theodore Roosevelt; An Autobiography, at p. 396 (Scribner 1926).

> Mondell and other Congressmen, who consistently fought for local and private interests as against the interests of the people as a whole."

Time and again during the Congressional debates, the supporters of the 1902 Act made clear the understanding that reclamation was a *national* project to be undertaken by the national government. To the suggestion that the federal government not itself reclaim the land in question but rather cede the land to the states, Congressman Reeder notes:[24]

> "We have been told that the Government, which is the owner of these lands, should not reclaim them itself, but should cede them to the States. It is sufficient answer to that to say that many State grants have been already made of different amounts of land and for different purposes, and the experience of the past has demonstrated beyond any question that the States cannot be safely intrusted with the reclamation and settlement of these lands. No matter what conditions might be imposed on such a grant, schemers and speculators would find some way of manipulating the State legislatures and getting control [886] of the lands in large tracts which would retard settlement."

And again Congressman Newlands notes as follows:[25]

> "Nothing can be accomplished by conveying this land to the States. The State lines are arbitrary lines, not drawn with reference to the watersheds, but arbitrarily by the surveyors, straight north, south, east and west. Were these States so bounded that each could compose an entire watershed, with all of its tributaries, then it would be possible to cede all the public domain to the States with the expectation of some just and proper result, but a river, with all its tributaries, may

24. House Debate at p. 6740.

25. *Id.* at p. 6734.

> reach into four or five States. Scientific reclamation requires conservation regardless of State lines."

However, by the inclusion of Section 8, Congress recognized that notwithstanding the national scope of reclamation, state law had important, albeit limited, functions in the equation. Certainly, Section 8 on its face does not make crystal clear the role of state law, although it is apparent that state law *does* have a role in regard to federal reclamation projects. By a careful reading of the Congressional history, however, it is apparent that state law would have at least two functions under Section 8 of the 1902 Act.

[2] As to the first function, Congressman Martin indicated that Section 8 would be used to modify and complement Section 7, which latter section dealt with the federal government's power of eminent domain:[26]

> "[Section 7] should be read in connection with section 8, which is in the nature of a limitation upon this section. Section 8 provides that the Secretary of the Interior, when proceeding under this act, must proceed in conformity with the State laws. It therefore makes, taking the two sections together, simply an instruction to the Secretary of the Interior to invoke the aid of the State laws upon the subject of eminent domain where necessary."

Indeed, it was settled by the Supreme Court in *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 466, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958) and in *Fresno v. California,* 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963), that Section 8 requires the federal government to look at state law to define the property interests for which compensation must be made pursuant to Section 7 eminent domain proceedings.

26. *Id.* at p. 6759.

[3] Secondly, Section 8 is a reaffirmation of the doctrine that the states are free to apply their own rules of water law and the federal government cannot enforce any particular rule upon any state. Section 8 was not written upon a clean slate, but rather, on the overlay of prior federal law. As examples of the federal legislation upon which Section 8 was based, Congressman Mondell cited the Act of July 26, 1866 (14 Stat. 253); the Act of July 9, 1870 (16 Stat. 218); and the Act of March 3, 1877 (19 Stat. 377).[27] In *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 55 S.Ct. 725, 79 L.Ed. 1356 (1935), and cases cited therein, the Supreme Court noted as follows:[28]

> "For many years prior to the passage of the Act of July 26, 1866 [citations omitted], the right to the use of water for mining and other beneficial purposes in California and the arid region generally was fixed and regulated by local rules and customs. The first appropriator of water for a beneficial use was uniformly recognized as having the better right to the extent of his actual use. The common law with respect to riparian rights was not considered applicable, or, if so, only [887] to a limited degree. Water was carried by means of ditches and flumes great distances for consumption by those engaged in mining and agriculture. [citations omitted] The rule generally recognized throughout the states and territories of the arid region was the acquisition of water by prior appropriation for a beneficial use was entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision,

27. *Id.* at p. 6679; other acts cited include the Act of March 3, 1891 (26 Stat. 1095) and the Act of June 4, 1897 (30 Stat. 1136) [sic].

28. 295 U.S. at 154, 55 S.Ct. at 727.

> but by local and customary law and usage as well. [citations omitted].
>
> This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866. [citations omitted]"

The Supreme Court further explained that the Act of July 9, 1870, which amended the Act of 1866, was a reaffirmation of the doctrine that the states are free to apply their own rules of water law.[29] See also *Kansas v. Colorado*, 206 U.S. 46, 94, 27 S.Ct. 655, 51 L.Ed. 956 (1907).

Finally, the Supreme Court notes that the Desert Land Act of March 3, 1877, is fully consistent with this doctrine:[30]

> "The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what might be an impediment to its full and successful operation."

[4] Similarly, Section 8 does not bind or purport to bind the states to any policy, but recognizes and gives sanction, as far as the United States and its grantees are concerned, to the state law doctrine of appropriative rights to water. In this regard, also, Section 8 guards prior rights granted by the individual states to individual water users.

As noted by Congressman Mondell in his committee's report to the House:[31]

29. *Id.* at p. 155, 55 S.Ct. 725.

30. *Id.* 295 U.S. at p. 164, 55 S.Ct. at 731.

31. House Committee at p. 8.

> "The American irrigator, beginning with the handicap of a woeful lack of knowledge of the subject, and an inherited common-law rule fatal to its solution, has acquired a vast fund of theoretic knowledge and practical experience. He has been instrumental in the adoption of rules and regulations, and the establishment of customs, relative to the use of water in irrigation to the arid region which, in some States, are well-nigh perfect, and in all are a distinct advance over former conditions. The bill recognizes the control of these local laws in matters of recording appropriations of water and in establishing and maintaining rights of users. . . ."

California, however, discerns another meaning within the words of Section 8. In short, California reads Section 8 as requiring the federal government to apply to affected states for permits to appropriate water for reclamation projects and to comply with terms and conditions which the affected states might impose (as long as not expressly prohibited by other federal law), before the federal government can acquire the water necessary to construct the project.

As an initial matter, it is at least arguable whether the United States, in acquiring water for the development of a reclamation project, should be considered an "appropriator" in the true legal sense of that term. Appropriation of a water right implies legal title thereto, and as the Supreme Court noted in *Ickes v. Fox,* 300 U.S. 82, 57 S.Ct. 412, 81 L.Ed. 525 (1937):[32]

> "Although the [federal] government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or [888] water rights became vested in the United States is not well

32. 300 U.S. at pp. 94-95, 57 S.Ct. at pp. 416-417.

> founded. Appropriation was made not for the use of the government, but, under the Reclamation Act [of 1902], for the use of the landowners."

Perhaps for clarity, it would be better to consider the federal government's actions in obtaining water for the development of reclamation projects as the "acquisition" rather than the "appropriation" of water.

However, even if the federal government is considered to be "appropriating" the water required to develop and operate the reclamation project, it is certainly not clear from the language of Section 8 nor from the Congressional history that the federal government must apply to states for permits to appropriate or that the federal government must comply with terms and conditions which states might impose on such permits.

If anything, the Congressional history of Section 8 indicates the opposite interpretation: that reclamation is an undertaking of national concern, transcending the often arbitrary geographic boundaries of individual states and territories. Even a leading States' rights advocate such as Senator Clark recognized the necessity of broad federal power in the development and construction of reclamation projects:[33]

> "The question of the conversation of waters is one of national importance; the question of reservoir sites and reservoir building is one that appeals to the [federal] Government as a matter of national import, but the question of State or Territorial control of waters after having been released from their bondage in the reservoirs which have been provided is a separate and distinct proposition . . . .

33. Senate Debate on the Relamation Act of 1902, 35 Cong. Rec. p. 2222.

> It is right that the General Government should control, should conserve, and should reservoir the headwaters of these streams. In this it is a national and not a State proposition. But in the distribution of these waters . . . it is right and proper that the various States and Territories should control in the distribution."

Of course, Senator Clark's suggestions as to the power of the *States* in controlling distribution were rejected by the House and ultimately, by Congress as a whole. Nevertheless, his comments are relevant and useful on the question of *federal* power regarding the development and construction of reclamation works.

The only comment within the Congressional history of the 1902 Act which might be supportive of California's position is a statement by Congressman Mondell in response to a question seeking clarification of the federal-state relationship envisioned by the 1902 Act. Congressman Mondell noted that it was necessary for the federal government, after determining the need and feasibility for a particular reclamation project, to refer to the affected state by "giving the notice and complying with the forms of law of the State . . . in which the works [are to be] located."[34]

On the one hand, this statement by Congressman Mondell supports California's position that the federal government must apply to affected states before acquiring the water necessary to construct a reclamation project. On the other hand, however, this statement might also be read, as the United States has done, to require compliance with the forms, but not necessarily with the substance of state law.

[5] Indeed, while the Congressional history of the 1902 Act indicates broad federal purpose and authority in the

34. House Debate at p. 6678.

operation and control of federal reclamation projects, the comity inherent in a federal system would not permit an overbroad usurpation of state sovereignity. Accordingly, the federal government is required, when acquiring water for federal reclamation projects, to com- [889] ply with the forms of state law, including application to state water boards where necessary, for two purposes: (1) to enable the state to determine, according to its law, whether there is sufficient unappropriated water available for the project; and (2) to give notice to the state of the scope of the project.

(2) Judicial Interpretation of the Reclamation Act of 1902.

Both the United States and California rely on several judicial decisions relating to the 1902 Act. It is necessary to review these cases to determine if they provide any insight on the question presented by the instant case.

(a) *Nebraska v. Wyoming,* 295 U.S. 40, 55 S.Ct. 568, 79 L.Ed. 1289 (1934) was a suit by Nebraska against the State of Wyoming for equitable apportionment of the waters of the North Platte River. The United States was not made a party to that suit and Wyoming, as part of its motion to dismiss, asserted that the United States was an indispensable party. In deciding that the United States was not an indispensable party, the Supreme Court stated:[35]

> "The bill alleges, and we know as a matter of law [citing Section 8 of 1902 Act], that the Secretary and his agents, acting by authority of the Reclamation Act and supplementary legislation, must obtain permits and priorities for the use of water from the state of Wyoming in the same manner as a private appropriator or an irrigation district formed under the state law. His rights can rise no higher than those of Wyoming, and an adjudication of the defendant's rights will necessarily bind him. Wyoming will stand

35. 295 U.S. at 43, 55 S.Ct. at 569.

> in judgment for him as for any other appropriator in that state. He is not a necessary party."

Additionally, there is dicta in this opinion which is certainly supportive of the position California advances to this court: the Supreme Court notes that the Secretary of the Interior had applied to the state engineer of Wyoming for permission to construct reservoirs and impound water "pursuant to the [1902] act," and also that the acts of the federal government in operating reservoirs are subject to the law of Wyoming.[36]

This dicta should not be afforded great weight, however, since the actions of the Supreme Court in 1935 should be considered procedural only. In 1938, the Supreme Court allowed the United States to intervene, over the objections of all the state parties, and stated that its order "shall be without prejudice to the determination on final decree of any of the substantive questions of law or fact advanced or to be advanced by any of the parties herein."[37]

(b) *Nebraska v. Wyoming*, 325 U.S. 589, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945) was both a continuation and an extension of the 1935 case. At this time, however, the United States asserted that it owned all of the unappropriated water in the North Platte River at the time it acquired water rights for two federal reclamation projects, the North Platte Project and the Kendrick Project. The Supreme Court did not reach the question whether the United States did, in fact, own all the unappropriated water in the North Platte River because it determined that the United States' acquisition of water rights for the North

36. 295 U.S. at 42, 55 S.Ct. 568.

37. *Nebraska v. Wyoming*, 304 U.S. 545, 546, 58 S.Ct. 1035, 82 L.Ed. 1519 (1938).

Platte Project and the Kendrick Project "have been obtained in compliance with state law."[38]

In fact, the United States had made filings with the state:[39]

> "Initiation of both projects [North Platte Project and the Kendrick Project] was accompanied by filings made pursuant to § 8 [of the 1902 Act] in the name of the Secretary of the In- [890] terior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the projects. There were also applications to the States for permits to construct canals and ditches. They described the land to be served. The orders granting the applications fixed the time for completion of the canal, for application of the water to the land, and for proof of appropriation. Individual water users contracted with the United States for the use of project water. These contracts were later assumed by the irrigation districts. Irrigation districts submitted proof of beneficial use to the state authorities on behalf of the project water users. The state authorities accepted the proof and issued decrees and certificates in favor of the individual water users. The certificates named as appropriators the individual landowners. They designated the number of acres included, the use for which the appropriation was made, the amount of the appropriation, and the priority date. The contracts between the United States and the irrigation districts provided that after the stored water was released from the reservoir it was under the control of the appropriate state officials."

Although the United States did submit the appropriate forms of law to the affected states and thereby gave notice of the construction of the reclamation projects, and also

38. 325 U.S. at 612, 65 S.Ct. at 1348.

39. 325 U.S. at 613, 65 S.Ct. at 1348.

complied with the state law requirements in the construction of canals and ditches carrying water from the projects to users, the Supreme Court was careful to point out an important caveat:[40]

> "Nor, as we shall see, is it important to the decree to be entered in this case that there may be unappropriated water to which the United States may in the future assert rights through the machinery of state law *or otherwise.*" [emphasis added]

And again the Court noted as follows:[41]

> "We intimate no opinion whether a different procedure might have been followed so as to appropriate and reserve to the United States all of these water rights. No such attempt was made."

On the one hand, these quotations may only be a reference to the power of eminent domain which the United States might have exercised pursuant to Section 7 of the 1902 Act. Viewed broadly, however, the quotations indicate a recognition that in the particular case before the court the United States *had* followed state law, but that opinion is reserved whether, under the circumstances of that case, the United States was *required* to do so under the 1902 Act.

And finally, the Supreme Court noted the narrow issues decided by the case, and indicated that its decision "in no

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40. 325 U.S. at 612, 65 S.Ct. at 1348.

41. 325 U.S. at 615, 65 S.Ct. at 1349.
The following language from the *Nebraska* opinion is also noteworthy:

> "We do not suggest that where Congress has provided a system of regulation for Federal projects it must give way before an inconsistent state system." 325 U.S. at 615, 65 S.Ct. at 1349.

This admonition was later borne out in *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958), discussed infra.

wise interfers with the ownership and operation by the United States of its storage and power plants, works, and facilities."[42]

(c) *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313 (1958) is not particularly helpful to either the United States or California in the disposition of the instant case. In *Ivanhoe* the United States Supreme Court reversed several decisions of the California Supreme Court which had refused to confirm certain contracts entered into between two state irrigation districts and a water agency on the one hand, and the United States on the other. The California Supreme Court had held that the language of Section 8 requiring compliance with state law overrode the [891] requirements of Section 5, which provides generally that no project water should be sold for use on land parcels exceeding 160 acres in size. The California court found that Section 5 of the federal law would be contrary to California law because it would result in discrimination against owners of parcels exceeding 160 acres. This decision led the court to refuse to confirm the aforementioned contracts. The United States Supreme Court in reversing the California Court, stated as follows:[43]

> "As we read § 8, it merely required the United States to comply with state law when, in the operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. . . . We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State. . . .

The California Supreme Court on remand in *Ivanhoe Irrigation District v. All Parties,* 53 Cal.2d 692, 3 Cal.Rptr.

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42. 325 U.S. at 616, 65 S.Ct. at 1349.

43. 357 U.S. at 292, 78 S.Ct. at 1183.

317, 350 P.2d 69 (1960), recognized the scope of federal power in operating reclamation projects when it noted:[44]

> "[The United States Supreme Court] expressly held that the United States may acquire, by condemnation if necessary, whatever water rights it may need to operate the project, so that after such acquisition such rights are not subject to state control."

However, this court feels that the true impact of the United States Supreme Court's decision in *Ivanhoe* as it relates to this case is not so much what the court said, but rather, what the court did not say. While recognizing that Section 8 did not require the United States to violate Section 5 merely because state law was not consistent with the requirements of Section 5, the United States Supreme Court expressly noted that its decision should not be read as "passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field."[45]

(d) *City of Fresno v. California,* 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28 (1963) is not particularly relevant to the inquiry in this case, although it is cited by both parties herein. *Fresno* merely stands for the proposition that while Section 8 of the 1902 Act requires compliance with California law when defining the property interests, if any, for which compensation must be made pursuant to the Section 7 eminent domain power, Section 8 cannot operate to prevent the United States from exercising the power of eminent domain.

(e) *Arizona v. California,* 373 U.S. 546, 83 S.Ct. 1468, 10 L.Ed.2d 542 (1963), while primarily concerned with the construction of Section 14 of the Boulder Canyon Project

44. 53 Cal.2d at 715, 3 Cal.Rptr. at 330, 350 P.2d at 82.

45. 357 U.S. at 292, 78 S.Ct. at 1184.

Act,[46] necessarily interpreted the applicability of Section 8 of the 1902 Act, since, under Section 14 of the Boulder Canyon Project Act, the reclamation law shall govern the management of the works, except as otherwise provided.

The Boulder Canyon Project Act established a reclamation project on the Colorado River. Notwithstanding the federal government's construction, ownership, operation, and maintenance of the Colorado River works and the broad power given by Congress to the Secretary of the Interior to make contracts for the distribution of water, it was argued that Sections 14 and 18 of the Boulder Canyon Project Act took away virtually all of the Secretary's power by permitting the States to determine with whom and on what terms the Secretary would make water contracts. The Supreme Court disagreed with this argument.

Section 18 of the Boulder Canyon Project Act states: [892]

> "Nothing herein shall be construed as interfering with such rights as the States [now have] either to the waters within their borders or to adopt such policies and enact such laws as they may deem necessary with respect to the appropriation, control, and use of waters within their borders."

The Supreme Court noted as follows:[47]

46. 45 Stat. 1057, 43 U.S.C. §§ 617-617t (1928).

47. 373 U.S. at 585-587, 83 S.Ct. at 1490-1491. The partial dissenting opinion of Mr. Justice Harlan is helpful in focusing on the narrowness of the Supreme Court's determination in *Ivanhoe.* Justice Harlan notes:

> "[*Ivanhoe*], despite its dictum that § 8 applies only to the acquisition of rights by the United States and not to the operation of a dam, holds only that the clear command of § 5 of the [1902 Act]—that water deliveries to each user not exceed the quantity required for 160 acres—prevails over state law, not that state law does not generally govern priorities in the use of water from federal reclamation projects under § 8." 373 U.S. at 623-624, 83 S.Ct. at 1510.

"Section 14 provides that the reclamation law, to which the Act is made a supplement, shall govern the management of the works except as otherwise provided, and § 8 of the Reclamation Act [of 1902], much like § 18 of the Project Act, provides that it is not to be construed as affecting or interfering with state laws 'relating to the control, appropriation, use, or distribution of water used in irrigation.' In our view, nothing in any of these provision affects our decision, stated earlier, that it is the Act and the Secretary's contracts, not the law of prior appropriation, that control the apportionment of water among the States. Moreover . . . we hold that the Secretary in choosing between users within each State and in settling the terms of his contracts is not bound by these sections to follow state law.

The argument that § 8 of the Reclamation Act requires the United States in the delivery of water to follow priorities laid down by state law has already been disposed of by his court in [*Ivanhoe* and *Fresno*] . . . . Since § 8 of the Reclamation Act did not subject the Secretary to state law in disposing of water in [*Ivanhoe*], we cannot, consistently with *Ivanhoe,* hold that the Secretary must be bound by state law in disposing of water under the Project Act."

California has argued, however, that the Boulder Canyon Project differs significantly from the New Melones Project in that the former is an interstate development, whereas the latter is "wholely intra-state." This contention ignores the fact that reclamation projects, as a whole, are of national importance, transcending state lines. And this is so even where the project works are located solely within the geographical confines of a single state. Crops raised by project water in California, for example, may feed families in Maine, or create processing jobs in Illinois. In *Arizona* it

was clear that the federal government, as operator of the Boulder Canyon Project, could not be subject to the varying and possibly inconsistent commands of different state legislatures in the disposal of water *from* the project. That holding, of course, does not directly answer the question posed by the instant case: whether the federal government must submit to state law in *acquiring* the water for the project.

In summary, it must be said that the cases cited and relied upon by both the United States and by California are more supportive of the position advanced by the United States, than of the position of California.

(3) Other federal legislation.

By analogy to acts of Congress passed into law subsequent to the 1902 Act, California contends that Congress has consistently intended to afford to the states the primary responsibility over "water distribution," and that the role of the federal government is to cooperate and participate with the states in [893] reclamation projects. As an initial matter, it must be reiterated that the issue in this case does not revolve around "water distribution," but rather, "water acquisition." A thorough reading of the enactments cited by California does not, however, evince a Congressional abdication of the federal government's role in developing, operating, and controlling, federal reclamation projects.

[6] (a) California contends that the policy declaration within the Federal Water Supply Act of 1958, 43 U.S.C. § 390b, is a reaffirmation of the primary responsibility of the states over "water distribution." That section reads as follows:

"It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for do-

> mestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with State and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects."

Certainly, this section is a recognition of the individual states' primary obligations to develop water supplies for internal uses. On this basis the federal government is charged with participation and cooperation with the states in the development of such water supplies. It would be too broad a reading of this section to infer that the federal government is thereby subjected to individual state *control* in the development and operation of federal reclamation projects.[48]

[7] (b) California also attempts to draw analogies to Section 5 of the Auburn-Folsom South Project Act, 43 U.S.C. § 616aaa—§ 616fff. This act generally provides for the construction of the Auburn Dam on the American River and for distribution facilities in downstream areas. The Auburn-Folsom South Project Act imposes specific obligations on federal officials, similar to those imposed in the New Melones Acts,[49] including: provision for power generation, 43 U.S.C. § 616aaa; flood control, 43 U.S.C. § 616bbb; recreation, 43 U.S.C. § 616ccc; fish and wildlife enhancement, 43 U.S.C. § 616ccc; protection of the needs of counties and watersheds in which the water originates, 43 U.S.C. § 616eee. Additionally, the Auburn-Folsom South Project Act imposes a further obligation on the Secretary of the

48. It should be noted that the Federal Water Supply Act also specifically provides that the act "shall not be construed to modify the provisions of" Section 8 of the 1902 Act. 43 U.S.C. § 390b(c).

49. See discussion of New Melones Authorizing Acts, *infra*.

Interior to "give due consideration" to California's water plan and to "consult" with local interests affected by the project, 43 U.S.C. § 616ddd.

Specifically, Section 5 of the Auburn-Folsom South Project Act provides as follows:

> "Nothing contained in [this Act] shall be construed by implication or otherwise as an allocation of water, and in the studies for the purposes of developing plans for disposal of water as herein authorized, the Secretary shall make recommendations for the use of water in accord with State water laws, including but not limited to such laws giving priority to the counties and areas of origin for present and future needs."

Section 5 of the Auburn-Folsom Project Act mandates that the Secretary of the Interior shall make recommendations for the use of water in accord with State law *in the studies for the purposes of developing plans for the disposal of water as authorized by the Act*. It does not confer project control on the State of California.[50] [894]

[8] (c) It is also pointed out by California that the National Environmental Quality Improvement Act of 1970 (NEQIA) provides that the "primary responsibility for implementing this policy [for protection and enhancement of the national environment] rests with State and local governments." 42 U.S.C. § 4371(b)(2). California further indicates that the National Environmental Policy Act of 1969 (NEPA) states that federal agencies must cooperate with States and local governments in the achievement of environmental goals. 42 U.S.C. § 4331(a).

50. This reading is entirely consistent with the Congressional history of § 5 of the Auburn-Folsom South Project Act. See S.Rep. No. 1289, 88th Cong., 2d Sess., 3-4 (1964); H.R. Rep.No. 1826, 88th Cong., 2d Sess., 10 (1964).

The Congressional intent underlying both NEQIA and NEPA was to raise awareness of environmental concerns and provide a mechanism for the input of such concerns in the decision-making process. The "mechanism" to be employed is the Environmental Impact Statement. At least in the case of the New Melones Dam project, the Ninth Circuit Court of Appeals has already tested the sufficiency of the Environmental Impact Statement and has determined that environmental concerns were adequately considered. *Environmental Defense Fund, Inc. v. Armstrong,* 487 F.2d 814 (9th Cir. 1973), *cert. denied* 416 U.S. 974, 94 S.Ct. 2002, 40 L.Ed.2d 564 (1974). There is no indication that Congress intended either NEQIA or NEPA to either affirm or establish a policy of state control of the environmental aspects of federal reclamation projects.

[9] (d) The Flood Control Act of 1944, P.L. 78-534, 58 Stat. 887, and the Flood Control Act of 1962, P.L. 87-874, 76 Stat. 1180, 1191, authorize the New Melones Project. California cites sections of these authorizing acts in support of its contention that states may exercise control over the development and operation of federal reclamation projects. California relies particularly on three aspects of these acts:

[1] The 1944 Act declares as follows:

> "[I]t is hereby declared to be the policy of the Congress to recognize the interest and rights of the states in determining the development of the water sheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers." 58 Stat. 887-88 (1944).

[2] The 1962 Act imposes specific obligations on federal government officials in operating the project including: giving priority to water needs within the Stanislaus River Basin before water is exported for use outside the basin, providing for the preservation and propagation of fish and wildlife, providing for the generation of electrical energy, and maintaining downstream water quality control. 76 Stat. 1191-92.

[3] The 1962 Act makes specific mention that states are not to control flood control aspects of the project, 76 Stat. 1191, and the 1944 Act specifically prevents state control with respect to water rights reserved for Indian reservations. 58 Stat. 891.

The authorizing act provisions cited by California, however, are entirely consistent with the concept of federal control of federal reclamation projects, coupled with federal-state development and coordination as to water uses. Coordination in the planning stage does not mean federal abdication or responsibility or control to state boards and agencies in the development and operation of federal reclamation projects. Further, the enumeration of specific federal obligations does not infer state control nor does the specific identification of exceptions to state control imply that other elements of project operation are to be placed within state control.

In summary, therefore, although the acts cited by California indicate a strong Congressional intention to include the [895] States and state law in the planning process and to ensure federal-state cooperation in projects, it cannot be said that these acts indicate by analogy or otherwise, a Congressional intention to abdicate the federal government's responsibility to develop and operate reclamation projects.

(4) Administrative Practice.

Although the Congressional history and judicial interpretation of Section 8 supports the legal posture of the United States, the State of California has urged this court to nevertheless consider the administrative practice of the Bureau of Reclamation vis a vis the state board. Certainly, when construing the meaning of a statute, it is pertinent and appropriate for a court to look to the administrative practice and interpretation placed on the statute by those charged with its administration. *Zemel v. Rusk,* 381 U.S. 1, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965). This rule of statutory construction is grounded in the belief that by statutory clarification Congress would presumably have altered any administrative interpretation which conflicts with the statute's intent.

The administrative practice of the Bureau of Reclamation is of some relevance in the present case. Both the United States and California have asserted to this court that this is a case of first impression and of national importance. If indeed this is true, as appears to be the case, then the administrative practice of the Bureau regarding the acquisition of water for federal reclamation projects has been an extraordinarily happy and tranquil practice which has somehow avoided the courts for three-quarters of a century since the enactment of Section 8. Such long-standing harmony would indicate that Congress was apparently satisfied that both the Bureau and the state boards were exercising authority within the allowable scope of Section 8.

The exhibits and affidavits on the subject of administrative practice have been primarily submitted by California. The Secretary of the Interior, the Commissioner of Reclamation. and the Regional Director of the Bureau of Reclamation have all been cited in these exhibits and affidavits. For example, California cites the 1944 statement submitted by the Regional Director of the Bureau, after consultation with the Secretary of the Interior and the Commissioner of Reclamation. This statement was quoted by the Supreme Court in *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 740, 70 S.Ct. 955, 94 L.Ed. 1231 (1950). The statement reads in pertinent part as follows:[51]

> "The Bureau of Reclamation does recognize and respect existing water rights which have been initiated and perfected or which are in the state of being perfected under State laws. The Bureau of Reclamation has been required to do so by Section 8 of the Reclamation Act of 1902 ever since the inception of the reclamation program administered by the Bureau of Reclamation. The Bureau of Reclamation has never proposed modification of that requirement of Federal law; and on the contrary, the Bureau of Reclamation and the Secretary of the Interior have consistently through the 42 years since the 1902 Act, been zealous in maintaining compliance with section 8 of the 1902 Act.
>
> They are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal Reclamation Laws is carried forward in conformity with State water laws. Ample demonstration of the effect of this law and policy of administration, in action, has been given in connection with the Central Valley Project. Water filings made by the State have been obtained by the Bu- [896] reau of Reclamation by assignment, and vested water rights have been acquired by the United States, by purchase, the consideration amounting to millions of dollars and being agreeable to the vendors —all in conformity with state law."

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51. Defendant's memorandum, p. 21, September 3, 1974.

In 1958, the Bureau repeated this view. The Bureau's Regional Director, in a letter to Representative Clair Engle of California, quoted from a letter of the Assistant Secretary of the Interior William E. Warne, as follows:[52]

> "As you know, the Sacramento Valley water rights are protected by: (1) Reclamation law which recognizes State water law and rights thereunder; (2) the State's counties of origin act, which is recognized by the Bureau in principle; and (3) the fact that Bureau filings on water rights are subject to State approval."

In 1950, Congress received a memorandum from the Commissioner of Reclamation entitled "Administrative Practice in Regard to Federal Appropriation of Water, a copy of which was also submitted to the Supreme Court in the *Gerlach* case. The Commissioner stated in pertinent part as follows:[53]

> "It is the practice of the Government to make appropriations of water from unnavigable streams in accordance with the provisions of state law (sec. 8, act of June 17, 1902, 32 Stat. 388).
>
> Before taking any steps toward the appropriation of water in any State, either by posting and recording notice of appropriations or filing application for permits to appropriate, full report as to the advisability of making such apropriation shall be submitted . .
>
> It appears from the foregoing that in practice the Department has generally regarded section 8 of the Reclamation Act of 1902 as directory of the course of action to be followed in its assertion of water rights

52. Defendant's memorandum, p. 22, September 3, 1974, quoting from 95 Cong.Rec. A961, 81st Cong., 2d Sess. (1948).

53. Defendant's memorandum, pp. 22-23, September 3, 1974, quoting Hearings on S. 1275 before the Subcommittee on Irrigation & Reclamation, Senate Comm. on Int. & Ins. Affairs, 88th Cong., 2d Sess., 311, 312, 320, 322, 323 (1964).

> for projects governed by the Federal Reclamation Laws and with respect to the recognition of rights under various State statutes and that it has followed the line marked out by that section regardless of whether the stream is navigable or nonnavigable.
>
> Public statements by officials of the Department of the Interior in recent years with the approval of the Department are in conformity with this practice.
>
> Whatever the correct theory be as to ownership of unappropriated water, the net effect as regards State laws is the same so far as the Bureau of Reclamation and its activities are concerned. This is true because of section 8 of the 1902 act. The Bureau of Reclamation and the Secretary of the Interior are required by that law to proceed in conformity with state water laws; they do so proceed; and they would strenuously oppose any change in the Federal law which now requires them to proceed in conformity with State water laws. Should the United States, in connection with the development of the Central Valley Project, as now or as it may be in the future authorized, desire to obtain or develop additional water supply for the project, it is and will be the intention and the clear policy of the Bureau of Reclamation and the Secretary of the Interior to obtain or develop the additional water supply by proceeding in conformity with the State law."

In 1952, Secretary of the Interior Oscar L. Chapman, wrote the following words in a letter to California Governor Earl Warren:[54] [897]

> "The State of California of course asserts a certain scope of jurisdiction of the water of the State and of its use, and by section 8 of the Reclamation Act of 1902 . . . Congress enjoined the Secretary of the Interior, in carrying out the provisions of the act, to

54. Defendant's memorandum, pp. 23-24, September 3, 1974, quoting from CVP Documents, Part 1, 810-812 (1956).

proceed in conformity with the State law. . . . The current estimate of the cost of the construction of the Central Valley Project is $700,000,000.00. The recoupment of the legally reimbursable portion of this Federal expenditure is necessarily dependent on a legal freedom, as well as a legally sanctioned duty, on the part of the United States to operate the project as it has been planned by both the State of California and the United States. This freedom in turn depends on the validity and extent of the rights of the United States to store, divert, and use water under the law of California. These rights have their inception in certain applications by the California Director of Finance to appropriate unappropriated water, which have been or are to be assigned by him to the United States, in certain applications made by the United States itself, and in already vested rights to the use of water which have been acquired by the United States from private parties through a negotiated purchase or inverse condemnation involving the payment of compensation."

The United States has not disputed the making of the statements cited by California, but rather has interpreted both their meaning and their relevancy differently than has California. The United States contends, *inter alia,* that the statements were all made prior to 1952 in a non-adversary proceeding and "are not likely to have the clarity one should look to to find the precise position of litigants,"[55] that the statements were all made prior to a number of very important court decisions which helped to define Section 8, and that in any case, the views expressed in the statements are entirely consistent with the notion that the

55. It is apparent, of course, that at least some of the statements were made after 1952.

federal government must comply with the *forms* of state law, but only on the basis of comity.[56]

As to the *actual* practice of the Bureau of Reclamation in California, affidavits have been submitted by California which assert that since 1938, the State Board has received 51 applications from the federal government to acquire water for various elements of the Central Valley Project. California notes that 41 of those applications were *conditionally* approved.[57] The United States does not dispute this, but asserts that it has consistently maintained to the State Board that it was appearing only for reasons of comity.[58]

[10, 11] In analyzing the statements and actions, two points are noteworthy. The Supremacy Clause of the United States Constitution is a limitation upon the states according to which federal law cannot be subordinated to state regulation within the areas of Congress' exclusive legislative powers. *People of the State of California ex rel State Water Resources Control Board v. Environmental Protection Agency,* 511 F.2d 963 (9th Cir. 1975). As noted earlier in this opinion, both parties to this action have admitted that because of the national implications inherent in reclamation, Congress could have afforded all power and control over federal reclamation projects to the federal government, giving no power and control to the states. See *Ivanhoe Irrigation District v. McCracken,* 357 U.S. 275, 294, 78 S.Ct. 1174, 2 L.Ed. 1313 (1958). California's position, however, is that the 1902 Act was a manifestation of Congress' intent to give [898] states certain

56. Plaintiff's memorandum, pp. 28-30, October 11, 1974.

57. Defendant's memorandum, p. 24, September 3, 1974.

58. Plaintiff's memorandum, p. 54, October 11, 1974. California does not dispute this assertion. See Defendant's memorandum, pp. 4-5, November 19, 1974.

powers in the operation and control of federal reclamation projects. To accept California's position, however, would require a finding that the 1902 Act waived exclusive federal jurisdiction. Waivers of exclusive federal jurisdiction, like waivers of sovereign immunity, are to be strictly construed. *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); *People of the State of California ex rel State Water Resources Control Board v. Environmental Protection Agency,* 511 F.2d 963 (9th Cir. 1975).

Secondly, this court must remain mindful of the admonition of the Ninth Circuit Court of Appeals in *Turner v. Kings River Conservation District,* 360 F.2d 184, 198 (9th Cir. 1966):

> ". . . [R]eason precludes an interpretation of the general provisions of Section 8 of the Reclamation Act [of 1902] . . . which would impute to Congress an intention to frustrate its plans for this project by subjecting it to the risk that it might never be used for some of the authorized purposes, should a state permit not be forthcoming."

Certainly, all the administrative pronouncements and actions cited above are susceptible to either the interpretation advanced by California or the interpretation advanced by the United States. Viewed, however, in the perspective of the Congressional history and judicial decisions relating to Section 8 previously cited in this opinion, this court is constrained to reject the interpretation advanced by California as being inconsistent with the Congressional history and those judicial decisions. On the other hand, all the administrative statements and actions are consistent with the view that the Bureau does and will

respect existing state water laws and further, that the Bureau does and will comply with state filing requirements *on the basis of comity.*

CONTENTIONS IN THE NATURE OF ESTOPPEL

As an alternative argument, California has raised several issues in the nature of estoppel against the United States. This alternative argument is grounded on the proposition that even if federal law precludes state control of federal reclamation projects in general, factors inherent in the instant case would estop the United States from contesting the authority of the State Board to issue Decision 1422. These contentions will be discussed seriatim.

(1) Equitable estoppel.

California contends that the United States should be equitably estopped from denying the authority of the Board, particularly as to Decision 1422, because the United States has consistently submitted to the Board or its predecessor, applications for permits to appropriate unappropriated water for the Central Valley Project.

California has cited the cases of *United States v. Georgia-Pacific Co.,* 421 F.2d 92 (9th Cir. 1970), *Brandt v. Hickel,* 427 F.2d 53 (9th Cir. 1970), and *Gestuvo v. District Director,* 337 F.Supp. 1093 (Cal. 1971), for the proposition that the United States cannot be estopped in its sovereign capacity, but can be estopped in its proprietary capacity. Such a distinction, however, is not the law in this circuit.

[12] Equitable estoppel may, under certain circumstances, be applied against the United States without regard to its "capacity", whether proprietary or sovereign. *United States v. Lazy FC Ranch,* 481 F.2d 985 (9th Cir.

1973). As the Ninth Circuit Court of Appeals stated in *Lazy FC Ranch*:[59]

> "[E]stoppel is available as a defense against the government if the government's wrongful conduct threatens to work a serious injustice and if the public's interest would not be unduly damaged by imposition of estoppel. . . . This proposition is true even if the government is acting in a ca- [899] pacity that has traditionally been described as sovereign . . . although we may be more reluctant to estop the government when it is acting in this capacity."

The test of estoppel applied in this circuit was outlined in *Georgia-Pacific* at 421 F.2d at 96: (a) the party to be estopped must know the facts; (b) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (c) the latter must be ignorant of the true facts, and (d) he must rely on the former's conduct to his injury.

[13] If in fact there is a legitimate disagreement between the United States and California as to the true nature of their relationship regarding the acquisition of water to develop federal reclamation projects, then it can hardly be said that the United States "knew" the true facts and thereby "induced" California to engage in detrimental conduct. Further, this court is doubtful whether the expenditure of time and effort by the State Board in the conduct of hearings can rise to the level of "injury" envisioned by the equitable estoppel doctrine.

(2) *Res judicata* and collateral estoppel.

California Water Code § 1360 provides that any person interested in any application for a permit to appropriate water may within 30 days after final action by the Board

59. 481 F.2d at 989.

file a petition for a writ of mandamus in the Superior Court to inquire into the validity of the Board's action. California Code of Civil Procedure § 1094.5 provides for the mechanism and procedures on review of administrative actions.

At no time did the United States seek a direct appeal of Decision 1422 to the California courts. Rather, the United States initiated the instant declaratory relief action in federal court. This failure to pursue California's mandamus provisions, argues California, makes Decision 1422 *res judicata* and, through the doctrine of collateral estoppel, prevents attack in this Court on issues and matters decided by the Board in Decision 1422.

[14] The doctrines of *res judicata* and collateral estoppel rest upon considerations of economy of judicial time and the public policy favoring the establishment of certainty in legal relations. The doctrine of *res judicata* has a double aspect: (1) it precludes parties or their privies from relitigating a cause of action that has been finally determined by a court of competent jurisdiction; and (2) any issue necessarily decided in such litigation is conclusively determined as to the parties or their privies in a subsequent lawsuit on a different cause of action. The latter aspect of *res judicata's* double nature is more properly called collateral estoppel. *Commissioner of Internal Revenue v. Sunnen,* 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed. 898 (1948); *Teitelbaum Furs, Inc. v. Dominion Insurance Co., Ltd.* 58 Cal.2d 601, 604, 25 Cal.Rptr. 559, 375 P.2d 439 (1962).

[15] Both the *Sunnen* case and the *Teitelbaum* case indicate, however, that a primal and essential element necessary for *res judicata* and collateral estoppel is that the court in the first action be a "court of competent jurisdiction". The rendition of a judgment without jurisdiction is a usurpation of power and makes the judgment void. 46

Am.Jur.2d Judgments § 22 (Bancroft-Whitney 1969). Before a judgment may operate as a conclusive determination of a cause of action, or of the issues litigated therein, it is necessary that it should have been rendered by a court of competent jurisdiction of the parties and of the subject matter or cause of action. 46 Am.Jur.2d Judgments § 446 (Bancroft-Whitney 1969). In dealing with an assertion of *res judicata* and its progeny collateral estoppel, this court may consider whether the subject matter, the issues and the character of the judgment rendered were of a class within the scope of the powers of the Board. 46 Am.Jur.2d Judgments § 446 (Bancroft-Whitney 1969).

[16] It is apparent from the previous discussion of Section 8, that the [900] Board acted *ultra vires* its authority vis a vis the Bureau. In a very real sense the Board has no jurisdiction over the Bureau, but may only, because of comity be asked to determine the availability of unappropriated water. As to the Bureau, the Board is not a "court of competent jurisdiction", but rather, once a determination has been made that unappropriated water is available, the Board functions in a purely ministerial manner in issuing permits to the Bureau. Where the Board seeks to do more than make the determination of availability of unappropriated water and, as in the instant case, attempts to impose terms and conditions on the granting of a permit to appropriate water for a federal reclamation project, the United States need not pursue California appellate remedies, but rather, could appropriately turn to a federal court in a declaratory relief action for the purpose of interpreting and clarifying federal law.

(3) Effect of Decision 1422.

As a concomitant to its estoppel arguments, California has asked this court to conclude as a matter of law that

Decision 1422 does not materially alter or conflict with the purposes of the New Melones Project. This contention is based primarily upon the reasoning that the United States will be allowed to acquire additional water for the project once it is able to show a need for additional water and once it develops a specific plan for the use of such water. California's argument in this regard is that Decision 1422 does not prevent the fulfillment of the project's purposes, but instead merely temporarily denies a part of the water sought by the United States until it can show a specific and identifiable need for the water.

The United States has strenuously argued that the conditions and terms sought to be imposed by Decision 1422 do in fact alter or conflict with the purposes of the New Melones Project.

[17] It appears to this court, however, that the question of the effect of Decision 1422 on the purposes of the New Melones Project is simply not material to the disposition of this case. As this opinion has previously noted, the "jurisdiction" of the Board in regard to the construction and operation of federal reclamation projects—once those projects have been approved—extends only so far as the determination of the availability of unappropriated water. Beyond that point, the Board has no jurisdiction. Therefore, *any* conditions or terms imposed by the Board must be considered *ultra vires* and "in conflict" with the purposes of the federal reclamation project.

(4) Public Policy.

Finally, California contends that if the United States prevails in its position, California will have no voice whatsoever in the use of its waters stored at federal reclamation projects, and this would be against the public interest of the people of California.

This contention ignores several basic facts. As an initial matter, California itself authorized the Central Valley Project through the Central Valley Project Act of 1933, Cal.Stats. Ch. 1042. Thereafter, California actively solicited federal monies and support for the development of the CVP and the New Melones Project. As recently as last year, the California electorate voted in favor of contnued development of the New Melones Project.[60] California has not contended that its input was not sought or that its law was not consulted in the planning process of the New Melones Project.

When speaking of the public interest of the people of California, it is useful to keep this case in perspective. This court does not view this case as a confrontation between environmentalists and conservationists on the one hand versus industrial, agricultural and municipal [901] water users on the other. The primal question before this court is one of state versus federal power as to the operation and control of federal reclamation projects. It is the sort of case which inevitably arises in the multiple sovereignty of a federal system of government. As such, this court must consider not only the public interest of the people of California as Californians, but also as citizens of the United States.

APPROPRIATENESS OF SUMMARY PROCEEDINGS

California's motions for judgment on the pleadings and for summary judgment are grounded on the premise that the case involves interpretations of federal law and therefore the issues in the case are legal, rather than factual. The question presented by a motion for judgment on the

60. During the 1974 California Primary, California voters rejected Proposition 17, the so-called "Deliver the River" Proposition which would have required the State of California to seek stoppage of the New Melones Project.

pleadings pursuant to F.R.C.P. 12 is solely one of law and, if an issue of fact is raised by the pleadings, the motion must be denied. Summary judgment, pursuant to F.R.C.P. 56, is only appropriate where there are no material facts in dispute and a party is entitled to judgment as a matter of law.

From the face of the complaint itself, issues of fact are raised[61] and thus in a technical sense, judgment on the pleadings is inappropriate.

Notwithstanding that issues of fact are raised on the face of the complaint, this court agrees with California that no *material* fact is in dispute. This court further agrees with California that this case involves legal questions concerning which judgment can be granted as a matter of law. Accordingly, summary judgment is appropriate. However, as this opinion has indicated, judgment is appropriate for the United States, a non-moving party. The question thus arises: Can summary judgment be granted in favor of a non-moving party?

[18] It would seem that where, as in the instant case, both parties have been afforded a full and fair opportunity to present their case, and where summary judgment is appropriate, a court should grant summary judgment to a non-moving party without the formality of a cross-motion for summary judgment.[62] See *Hennessey v. Federal Security Administrator*, 88 F.Supp. 664 (Conn. 1949); *Local 453 v. Otis Elevator Company*, 314 F.2d 25 (2d Cir. 1963).

61. For example, the complaint asks this court to find that the conditions and terms imposed by Decision 1422 conflict with the construction and operation of the New Melones Project.

62. It should be noted that California has consistently admitted in its pleadings and in open court that should this court find against it as a matter of law, then summary judgment would be appropriate for the non-moving party, the United States.

[19] There is no doubt that summary judgment is applicable to a proceeding for declaratory relief. 6 Moore's Federal Practice § 56.17 [19] (1974). Accordingly:

Declaratory judgment is entered as follows:

(1) The United States can appropriate unappropriated water necessary for use in any federal reclamation project within the State of California, but must first, in accordance with comity, apply to the California State Water Resources Control Board for a determination by that Board of the availability of unappropriated water;

(2) When the United States submits applications to the California State Water Resources Control Board, that Board must grant such applications if unappropriated waters are available;

(3) Nothing contained in Section 8 of the 1902 Act or in any other presently existing federal law, regulation or administrative directive allows the California Water Resources Control Board to impose any terms or conditions in permits issued to the United States as a result of applications to the Board by the United States for allocations of unappropriated water;

(4) Decision 1422 is void in all respects where it attempts to impose terms and conditions of any kind upon the ac- [902] quisition by the federal government of unappropriated waters as said terms and conditions may relate to the control, development or operation by the federal government of the New Melones Project.

California's motion for summary judgment is denied and summary judgment is granted for the United States in accordance with the views expressed in this opinion.

It is so ordered. [903]